IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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| IN RE ATMEL CORPORATION | : | CONSOLIDATED |
| SHAREHOLDERS LITIGATION | : | C.A. No. 4161-CC |

# DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTION FOR INJUNCTIVE RELIEF

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## PRELIMINARY STATEMENT

On November 10, 2008, Atmel Corporation ("Atmel") faced (1) an unsolicited and inadequate takeover bid from Microchip Technology, Inc. ("Microchip") and ON Semiconductor Corporation ("ON"), and (2) Microchip's receipt of regulatory clearance to acquire up to 100% of its voting securities. On that date, Atmel adopted an amendment (the "Amendment")[1] to its Preferred Share Rights Agreement[2] (as amended, the "Rights Plan"). The Amendment lowered the percentage of equity ownership necessary to trigger the Rights Plan from 20% to 10% for any person or group of persons that made a "Takeover Proposal" on or after October 1, 2008, and expanded the definition of "Beneficial Ownership" to encompass derivative contracts providing economic benefits and risks that correspond to ownership of Atmel common shares.

Plaintiff's motion does not challenge the Atmel board's determination to resist the now-withdrawn Microchip/ON takeover bid, the reduction of the Rights Plan trigger, or the Amendment's objective of treating ownership of equity derivatives equally with stock ownership. Nor does plaintiff's motion challenge the Amendment on any statutory ground, assert a *Unocal* claim against the Amendment or assert any entrenchment or other improper fiduciary purpose.

Rather, plaintiff assails the Amendment on narrow grounds, contending that its language is so "vague" as to render its adoption a "*per se*" breach of fiduciary duty, one that

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1 *See* Adlerstein Aff. Ex. 1. Citations to "Adlerstein Aff. Ex." are to the exhibits to the accompanying Affidavit of David M. Adlerstein.

2 *See* Adlerstein Aff. Ex. 2.

plaintiff claims will cause it to suffer irreparable harm absent injunctive relief invalidating the Amendment.

Defendants will show that the Amendment is clear and *protects* Atmel stockholders from abusive takeover tactics that would deprive stockholders of the premium to which they would rightfully be entitled upon a change of control. Contrary to plaintiff's assertion that parties are unable to ascertain their beneficial ownership under the Amendment, Pl. Br. 2, a party always can determine the maximum extent of its derivative interests under the Amendment, because its beneficial ownership is capped at the notional number of Atmel shares subject to that party's derivatives contracts (referred to in the Amendment as the "Notional Common Shares"), and can determine its actual extent of beneficial ownership by obtaining information from its counterparties. Moreover, contrary to plaintiff's contention that Atmel is unable to determine "when a triggering event has occurred," Pl. Br. 17, the Rights Plan includes a mechanism that prevents the rights under the Plan from becoming exercisable without Atmel's knowledge.

Injunctive relief is also unwarranted for a deeper reason: In contending that the Amendment is a "*per se* breach" of fiduciary duties, Pl. Br. 19, plaintiff asks the Court to create a precedent that would inevitably involve the courts of Delaware in anticipatory litigation over the interpretation of corporate instruments in a factual vacuum. Injunctive relief here would invite facial challenges to the organic documents of Delaware corporations merely because one may be able to conjure up hypotheticals in which the application of a provision may be disputable (or, as plaintiff calls it, "vague" or not "objectively" determinable). Neither precedent nor public policy commend opening up such a new species of litigation.

Plaintiff's motion is also deficient because of a failure to show irreparable harm. Indeed, plaintiff is seeking relief from illusory harm: the Amendment did not in fact deter Microchip from initiating a proxy contest[3] and could not possibly deter any other person from seeking to remove the Atmel board for the simple reason that the Rights Plan expires on October 15, 2009 and the deadline for making director nominations at Atmel's 2009 annual meeting lapsed on December 16, 2008.

## NATURE AND STAGE OF THE PROCEEDINGS

This action consolidates three cases alleging that Atmel's board of directors breached their fiduciary duties in responding to a now-withdrawn proposal by Microchip to acquire Atmel. The alleged breaches include the adoption of the Amendment. Defendants have moved to dismiss the actions. On February 2, 2009, one plaintiff, Louisiana Municipal Police Employees' Retirement System, moved for injunctive relief invalidating the Amendment. No discovery has been taken and the moving party disclaims any need for discovery.

## STATEMENT OF FACTS

Plaintiff describes its motion as alleging a "*per se* breach of fiduciary duty," because the Amendment is "so vague that nobody can objectively determine how it operates or when it is triggered . . . ." Pl. Br. 10, and is thereby "invalid on its face." Pl. Br. 12. Plaintiff nevertheless offers an incomplete statement of the "factual and procedural background," Pl. Br. 4 — all unreferenced to any record evidence or even the public record — insinuating that the Amendment discouraged Microchip. A more complete statement shows precisely the opposite,

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[3] Microchip nominated a slate of directors on December 15, 2008 and withdrew its slate on February 10, 2009 for reasons unrelated to the Amendment. *See infra* pp. 14-15.

and shows that the Amendment validly addresses an emerging but well-recognized abusive takeover practice.

**A. <u>The Atmel Rights Plan</u>**

Atmel adopted the Rights Plan in October 1999. *See* Adlerstein Aff. Ex. 2. The Plan will expire on October 15, 2009. The Rights Plan, which is functionally identical to similar plans adopted over the years by over 3,000 other companies[4] and upheld by the courts of Delaware,[5] deters abusive takeover tactics by making them prohibitively expensive to a raider and encourages a prospective acquiror to negotiate with Atmel's board of directors.

The Rights Plan accomplishes this by giving all stockholders — other than the raider — the right (a "Right") to purchase stock at half price from and after the date (a "Distribution Date") that is 15 days following the first date of a public announcement that a raider has become the beneficial owner of 20% (or, under limited circumstances as described below, 10%) or more of Atmel's common stock (an "Acquiring Person"). Rights Plan §§ 1(a), 1(l), 11(a)(ii). While the Rights Plan provides that a person's becoming an Acquiring Person constitutes a "Triggering Event," *id.* § 1(qq), the Rights are not *exercisable* unless and until a Distribution Date has occurred, *id.* § 7(a). In other words, the exercise of the Rights is conditioned on the occurrence of a prior public announcement. The Rights Plan expressly vests Atmel's board with the power to administer the Rights Plan, including with discretionary authority to exempt a party from the definition of "Acquiring Person" by determining that it inadvertently became such, *id.* § 1(a), to make interpretations and determinations under the

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4 *See* RiskMetrics, U.S. Proxy Voting Manual, Chapter 3 (2009).

5 *See Moran* v. *Household Int'l, Inc.*, Del. Ch., 490 A.2d 1059 (1985), *aff'd,* Del. Supr., 500 A.2d 1346 (1985); *Account* v. *Hilton Hotels Corp.*, Del. Supr., 780 A.2d 245 (2001).

Rights Plan, *id.* § 29, to supplement or amend the Rights Plan, *id.* § 27, and to redeem the Rights at any time prior to the occurrence of a Distribution Date, *id.* § 23.

Atmel amended the Rights Plan on November 10, 2008.[6] The Amendment has two principal features. First, it lowered the 20% "Acquiring Person" threshold to 10% for any person or group that made a "Takeover Proposal" on or after October 1, 2008.[7] Second, it expanded the definition of "Beneficial Ownership" to encompass derivative contracts providing a person with economic benefits and risks that correspond to ownership of Atmel common shares, specifically providing that the number of shares that a person may be deemed to beneficially own under a derivative contract is capped at the "notional" amount of shares that is the subject of the contract.

### B. The purpose of the Amendment: to deter stealth takeover tactics

The Amendment was motivated by a takeover proposal that the Atmel board determined to be inadequate, and by a concern — most sharply expressed by the United States District Court for the Southern District of New York in a recent case involving CSX

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[6] *See* Adlerstein Aff. Ex. 1.

[7] A "Takeover Proposal" is "any proposal or offer with respect to (1) a tender offer or exchange offer, a merger, reorganization, share exchange, consolidation, business combination, recapitalization, or similar transaction involving 50% or more of the Common Shares [of Atmel] then outstanding or assets of the Company and its Subsidiaries, taken as a whole, (2) an acquisition of Common Shares that upon consummation that would result in such Person, together with all Affiliates and Associates of such Person Beneficially Owning, in the aggregate, an amount equal to 50% or more of the Common Shares then outstanding or (3) an acquisition of assets of the Company or its subsidiaries representing or generating an amount equal to 50% or more of the consolidated assets, revenues or earnings of the Company or its Subsidiaries, taken as a whole." Amendment § C. Proxy solicitations are *not* embraced by this definition; hence plaintiff's assertion (Pl. Br. 6 n.4) that this definition would preclude a stockholder who exceeds the 10% threshold from pursuing a proxy fight is incorrect.

Corporation[8] — that raiders could enhance their ability to obtain control of a company through derivative securities that effectively park common stock in the hands of counterparties who would vote the shares in the raider's favor or promptly hand over to the raider large blocks of the target company's stock at a relatively low cost and without advance warning.

First, the takeover proposal: On October 2, 2008, two of Atmel's competitors publicly announced an unsolicited proposal to acquire the company for $5.00 per share (amounting to $2.3 billion). Although the proposed transaction consideration exceeded the then-current Atmel market price of $3.28 per share, the proposal was subject to numerous conditions, including financing, due diligence and the sale of certain Atmel businesses to one of the bidders. The Atmel board of directors, after consulting with financial and legal advisors, concluded that the proposal was inadequate and contrary to the interests of the company and its stockholders[9] — a judgment not challenged on this motion.[10] The threat posed by this inadequate takeover proposal increased on November 7, 2008 when the main bidder — Microchip — received regulatory clearance to acquire over 50% of Atmel's shares.[11] Microchip had approximately

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8 *CSX Corp.* v. *The Children's Inv. Fund Mgmt. (UK) LLP*, 562 F. Supp. 2d 511 (S.D.N.Y. 2008), *aff'd* as to relief, 2008 WL 4222848 (2d Cir. Sept. 15, 2008) (appeal as to merits pending).

9 *See* Adlerstein Aff. Ex. 3.

10 Nor is the independence of the seven-member board of directors, of whom only two are members of Atmel management. *See* Adlerstein Aff. Ex. 4, at 13; http://atml.client.shareholder.com/directors.cfm (last visited Mar. 10, 2009).

11 On October 8, 2008, Microchip filed for approval under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") to acquire at least 50% and up to 100% of Atmel's voting securities. It is highly unusual for a prospective acquiror to file for approval under the HSR Act in the absence of having entered into a definitive acquisition agreement because the filing fee is expensive — $280,000 for transactions valued in excess of $500 million — not including the fees and expenses of counsel. 15 U.S.C. § 18a note 3(b)(1). Further, where the prospective acquiror does not expect to receive a "second request" (as was the case with Microchip), there is no bona fide timing incentive to file for HSR Act clearance prior to entering into a definitive acquisition agreement. Accordingly, the evident purpose of Microchip's early filing was to enable it to acquire shares of Atmel above the $63 million limit

(footnote continued)

$1.1 billion of cash and short-term investments and thus had the wherewithal to purchase well more than the number of shares that, when added to the 4% of the shares Microchip had already secretly acquired on the open market,[12] would bring its ownership to 19.9% of Atmel's common shares — just below the threshold required to trigger the Rights Plan — with no control premium.

The threat was compounded by the emergence of derivative securities as a share accumulation and takeover device that may evade traditional rights plans. A takeover bidder or its allies may eschew directly purchasing shares of target common stock and instead enter into derivative contracts pegged to the performance of a "notional" amount of the target company's stock, which the counterparty — typically a bank or hedge fund — would hedge by purchasing shares of target stock equivalent to the notional number of shares. The counterparty effectively has no exposure to changes in the price of the stock: if the price increases, the profit would be paid to the first party (sometimes called the "receiving party") and if the price decreases, the receiving party would cover the loss to the counterparty. The counterparty profits from a premium paid by the receiving party, calculated to cover the counterparty's financing cost and credit risk. As beneficial owner, the counterparty has the right to vote the shares but, having no

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(footnote continued)

then imposed by the HSR Act in the absence of clearance. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 73 Fed. Reg. 5,191 (Jan. 29, 2008).

[12] According to Microchip's notice to Atmel on December 15, 2008, Adlerstein Aff. Ex. 5 (the "Microchip Notice"), it commenced acquiring Atmel shares on July 21, 2008, had acquired approximately 4.8 million Atmel shares prior to its October 1, 2008 announcement of its acquisition proposal, had continued buying shares on an almost daily basis until it had acquired in total approximately 17.7 million shares (approximately 4.0% of the outstanding shares) prior to receiving clearance under the HSR Act (essentially the maximum number of shares that it could own before receiving such clearance), and had then bought another 2.2 million shares before the announced withdrawal of its proposal on November 18, 2008.

stake in the performance of the company, has no reason to vote the shares other than in the interest of the receiving party.

The advantages to a takeover bidder are plain: without exceeding triggering thresholds under a traditional rights plan or disclosure thresholds under the federal securities laws,[13] the bidder can warehouse shares in friendly hands — shares that will likely be voted in favor of the bidder's agenda at a stockholder meeting or that may be transferred to the bidder in a matter of moments to close out the derivative position. This technique is an example of what two prominent corporate law scholars, Professors Henry Hu and Bernard S. Black of the University of Texas Law School, have labeled "decoupling" of economic interest from voting power, involving "hidden (morphable) ownership." Henry T. C. Hu & Bernard Black, *Debt, Equity and Hybrid Decoupling: Governance and Systematic Risk Implications*, 14 Eur. Fin. Mgmt. 663, 664-65 (2008) (hereinafter cited as "*Decoupling*").[14]

Professors Hu and Black have compiled over eighty recent examples (at least thirty-two in the U.S.) of "equity decoupling," and have concluded that some "acquirers have amassed 30-45% stakes in target firms without prior disclosure." *Decoupling* at 664. In their words, "[h]idden (morphable) ownership can be seen as one form of 'soft parking' of shares: arranging for shares to be held in friendly hands to avoid regulatory or other burdens of direct

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13 *See, e.g.*, Securities Exchange Act of 1934 (the "Exchange Act") § 13(d) ("Section 13(d)"), 15 U.S.C. § 78m(d) (2002).

14 Hu holds the Allan Shivers Chair in the Law of Banking and Finance at the University of Texas Law School. Black holds the Hayden W. Head Regents Chair for Faculty Excellence, and is also a Professor of Finance in the McCombs School of Business at the University of Texas. Hu and Black have studied derivative securities and the "decoupling" problem for years, and have published a number of articles on those subjects. *See Decoupling*, 695-696. Their work has been favorably cited in an opinion holding that a derivative plaintiff who retained record ownership but not an economic interest in the corporation was an "empty plaintiff" without standing to maintain a derivative action. *Parfi Holding AB* v. *Mirror Image Internet, Inc.*, Del. Ch., 954 A.2d 911, 940 & n.108 (2008).

ownership, yet retaining informal access to the desired shareholder rights," leading to the phenomenon of the empty voter with "substantially greater voting than economic ownership . . . ." *Id.* at 667 (emphasis omitted).

"[M]orphable voting rights," Hu and Black explain, permit evasion of rules against vote buying, mandatory bid rules, short-swing trading profit rules, limits on short sales and margin borrowing, antitrust rules and "[s]tatutory, contractual and other limits on voting power," including, most pertinently, "poison pill takeover defences [that] limit stakes acquired without the target's consent." *Id.* at 669-70. Explaining further:

> Some hedge funds and other investors have sought to avoid ownership disclosure rules that turn on voting rights or on full ownership of shares by taking the long side of an equity swap contract, with a derivatives dealer. The dealer will typically hedge its exposure, often by holding matched shares. Without more, the dealer is now an empty voter — it has voting rights but no economic interest. The investor has economic-only ownership, but no formal voting rights. However, if the investor later wants to vote, it might well be able to return to the dealer, unwind the swap, and simultaneously purchase an equivalent number of shares either from the dealer or in the market, and thus obtain voting rights to accompany economic ownership. Practices vary, but the dealer may be willing to sell the matched shares directly to its client to accommodate its client's request.

*Id.* at 676. Thus, Hu and Black conclude, it is "possible for a takeover bidder to acquire a large, sometimes effectively controlling stake in a target, without public disclosure. The takeover battle may be essentially over, before it has begun." *Id.*

The work of Professors Hu and Black was heavily relied upon by Judge Lewis A. Kaplan of the United States District Court of the Southern District of New York, in a landmark opinion following a trial on the merits of securities law claims arising from a proxy fight involving CSX. *CSX Corp.* v. *The Children's Inv. Fund Mgmt. (UK) LLP*, 562 F. Supp. 2d 511 (S.D.N.Y. 2008), *aff'd* as to relief, 2008 WL 4222848 (2d Cir. Sept. 15, 2008) (appeal as to merits pending). Two hedge funds entered into equity swaps covering about 12% of the outstanding CSX shares — and bought an additional 8.3% of outstanding CSX shares outright, bringing the total economic exposure to approximately 20% — but failed to file a Schedule 13D[15] disclosing their ownership and purposes, and then solicited proxies to elect nominees to the CSX board of directors. *Id.* at 536.[16]

CSX filed suit alleging that the funds had failed to comply with Section 13(d). The funds maintained that, though the swaps conferred "substantially all the indicia of stock ownership save the formal legal right to vote the shares," they "did not beneficially own the shares referenced by the swaps and thus were not obliged to disclose sooner or more fully than they did." *Id.* at 516-517.

In an exhaustive opinion, Judge Kaplan held that, in "amassing their swap positions," defendants had created "arrangement[s] that prevent[] the vesting of beneficial ownership as part of a plan or scheme to avoid the disclosure that would have been required" if they had "bought the stock outright" and therefore were deemed to be beneficial owners of the "referenced shares" for purposes of Section 13(d). *Id.* at 517 (citing SEC Rule 13d-3(b)).[17] Declaring that the Exchange Act "is concerned with substance, not incantations and formalities,"

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15 17 C.F.R. §240.13d-101 ("Schedule 13D").

16 The fact pattern at issue in CSX is not unique. Most recently, in December 2008, hedge fund Pershing Square Capital Management, which beneficially owned 7.5% of General Growth Properties' common stock, disclosed that it had entered into derivatives contracts giving it the economic benefit of owning another 18.1% of General Growth's common stock. *See* Kris Hudson & Lingling Wei, *Ackman Raises the Stakes on His General Growth Bet*, Wall St. J., Dec. 10, 2008, at C10.

17 17 C.F.R. § 240.13d-3(b).

Judge Kaplan entered an order enjoining the defendants from further Section 13(d) violations. *Id.*[18]

Judge Kaplan deemed it unnecessary to decide the "question whether the holder of a cash-settled equity [swap] beneficially owns the referenced stock held by the short counterparty," but noted that "[t]here are persuasive arguments for concluding, on the facts of this case, that the answer is 'yes' — that defendants beneficially owned at least some and quite possibly all of the referenced CSX shares held by their counterparties." *Id.* at 517. Judge Kaplan limned those arguments in the course of reviewing the basic features of derivative contracts, focusing particularly on total return equity swaps ("TRS"), a commonly used form of derivatives contract. Citing Professors Hu and Black, Judge Kaplan explained that swap counterparties "typically hedge their short exposures by purchasing the referenced securities in amounts identical to those referenced in the swap agreements"; that "[i]nstitutions that hedge short TRS exposure by purchasing the referenced shares typically have no economic interest in the securities" but nevertheless "have the right to vote the referenced shares"; and that, while voting practices may vary, "one may suppose that banks seeking to attract swap business well understand that activist investors will consider them to be more attractive counterparties if they vote in favor of the positions their clients advocate." *Id.* at 521-22. "In any case," Judge Kaplan explained,

> the accumulation of substantial hedge positions significantly alters the corporate electorate. It does so by (1) eliminating the shares

[18] Judge Kaplan declined to enjoin defendants from voting their CSX shares or grant "other drastic relief," believing that "penalties for defendants' violations must come by way of appropriate action by the Securities and Exchange Commission . . . or the Department of Justice." 562 F. Supp. 2d at 517. Recently, the defendants agreed to an $11 million payment to CSX in settlement of the claim that their imputed derivative-based ownership placed them in violation of the short-swing profit rule of Section 16(b) of the Exchange Act, 15 U.S.C. § 78p(b) (2002). *See* Adlerstein Aff. Ex. 6.

> constituting the hedge positions from the universe of available votes, (2) subjecting the voting of the shares to the control or influence of a long party that does not own the shares, or (3) leaving the vote to be determined by an institution that has no economic interest in the fortunes of the issuer, holds nothing more than a formal interest, but is aware that future swap business from a particular client may depend on voting in the "right" way.

*Id.* at 522.

The *CSX* opinion also catalogued the advantages that derivatives confer on a party that "contemplates a tender offer, proxy fight, or other corporate control contest": (1) avoidance of disclosure of ownership levels under Sections 13(d) and 13(g)[19] of the Exchange Act; (2) lowering the cost of acquiring shares by avoiding price increases in anticipation of a control bid; (3) permitting strategic timing of disclosures to "ambush an issuer"; and (4) immediate acquisition of securities by unwinding the derivatives at a time best suited to the receiving party. *Id.* at 522-23. Judge Kaplan remarked, "the hedge positions of the counterparties hang like the sword of Damocles over the neck of CSX." *Id.* at 542.[20]

"In the last analysis," Judge Kaplan concluded, there were "substantial reasons" for concluding that TCI was the beneficial owner of the CSX shares held as hedges by its short counterparties. *Id.* at 545. The "very nature" of the transactions required "the counterparties to hedge their short exposures" by the "purchase of physical shares"; "once the counterparties bought the shares, TCI had the practical ability to cause them to sell simply by unwinding the

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[19] Securities Exchange Act of 1934 § 13(g), 15 U.S.C. § 78m(g) (2002).

[20] "Once the Hart-Scott-Rodino waiting period expired," Judge Kaplan explained, "nothing more was required to move the legal ownership of the hedge shares from the banks to TCI than the stroke of a pen or the transmission of an email," a fact that "greatly enhance[d] TCI's leverage over CSX, even if it never settles any of the TRSs for cash . . . ." 562 F. Supp. 2d at 542. These words resonate here because the HSR Act waiting period for Microchip expired on November 7, 2008 — three days before the adoption of the Amendment. *See supra* 6 and note 11.

swap transactions"; and TCI "was in a position to influence the counterparties . . . with respect to the exercise of their voting rights." *Id.* at 546.

The *CSX* court's concern with large stock accumulations via derivatives is not idiosyncratic. In addition to relying on Professors Hu and Black, the court relied on similar conclusions reached by Professor and former SEC Commissioner Joseph Grundfest of Stanford Law School and Professor Marti Subrahmanyam of the Stern School of Business at New York University. *See id.* at 547 n.191. More recently, House Bill No. 19 was just introduced in the Delaware House of Representatives, upon the recommendation of the Council of the Corporation Law Section of the Delaware State Bar Association, that would amend the Delaware General Corporation Law (the "DGCL") to permit bylaws requiring a corporation to include stockholder nominees in its proxy materials. The proposed amendments expressly authorize such bylaws to require a stockholder proponent to hold minimum levels of "beneficial ownership," defined to take into account "options or other rights in respect of or related to" the corporation's capital stock, and to require the proponent to disclose information concerning both its shares and "options or other rights in respect of or related to" such stock. Adlerstein Aff. Ex. 7, § 1(1)-(2). The synopsis of the bill states that this definition is intended to "include[] rights that derive their value from the market price of the stock," *i.e.*, derivatives. Adlerstein Aff. Ex. 7, Synopsis, § 1.

To avoid the "sword of Damocles" of Judge Kaplan's metaphor, Atmel amended the Rights Plan to bring derivative contracts within the definition of beneficial ownership.[21] As detailed below, it did so by language that is clear, practical and understandable to any person

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[21] Atmel is in good company. Based on searches in the SEC's EDGAR system, since the beginning of 2008 approximately 16 other companies, each with a market capitalization exceeding $300 million at the time of adoption, have adopted rights plans, or rights plan amendments, extending the definition of beneficial ownership to include investors with economic exposures through derivatives.

considering entering a derivatives contract with reference to Atmel shares. Plaintiff points to no person who has been deterred from entering into such a contract, either as a receiving party or a counterparty, nor to any person who has been deterred from making an acquisition proposal or a proxy solicitation.

## C. <u>Microchip was not deterred by the Amendment</u>

Microchip and ON were not confused or deterred by the Amendment. On November 12, 2008 — two days after Atmel announced the Amendment — Microchip and ON publicly declared "[w]e remain fully committed to our offer despite unprecedented weakness and volatility in the equity markets," and Microchip stated that it intended to nominate a slate of directors at Atmel's 2009 annual meeting. Adlerstein Aff. Ex. 8. Six days later, ON announced its withdrawal from the proposal, citing "unforeseen deterioration in the semiconductor market" and "unprecedented weakness in the financial markets," which caused Microchip to drop its highly conditional proposal. Adlerstein Aff. Ex. 9. On December 4, 2008, Microchip announced it was continuing to evaluate its alternatives with respect to Atmel, Adlerstein Aff. Ex. 10, and on December 15, 2008 — *after* Atmel announced a revised forecast for its fourth quarter earlier that day — notified Atmel of a proposed slate of directors.[22] Then, on February 10, 2009, Microchip announced that it was terminating consideration of a transaction with Atmel and withdrawing its slate because of "economic uncertainty" and a purported "lack of visibility" in

[22] *See* Adlerstein Aff. Ex. 11; Adlerstein Aff. Ex. 5. Microchip was not only undeterred from launching a proxy solicitation, it was undeterred from engaging in a derivatives transaction. Its notice with respect to the annual meeting disclosed that, after the Rights Plan was amended, Microchip had sold in-the-money puts on 2.35 million Atmel shares with an exercise price of $5.00 per share that could be used to put Atmel shares to Microchip in February and May 2009, thus encouraging investment professionals to accumulate Atmel shares with no downside risk. Predictably, Microchip disclaimed beneficial ownership in the related shares. *See* Adlerstein Aff. Ex. 5 at 8.

Atmel's business. Adlerstein Aff. Ex. 12. None of these announcements even mentioned the Rights Plan or the Amendment, much less suggested that they were a factor in Microchip's or ON's abandoning their takeover efforts.

As will now be shown, plaintiff has failed to meet the requirements for injunctive relief, and its motion should therefore be denied.

## ARGUMENT

### I. THE STANDARDS FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

A preliminary injunction is an "extraordinary remedy" that "will never be granted unless earned"; it requires the moving party to prove "(1) likelihood of irreparable harm to the plaintiffs in the absence of an injunction; (2) the likelihood of plaintiffs' success on the merits of the underlying claim; (3) a balance of the harms plaintiffs would suffer in the absence of an injunction against the harms defendant would suffer by the issuance of the injunction; and (4) the public interest." *Wayne County Employees' Ret. Sys.* v. *Corti*, Del. Ch., 954 A.2d 319, 329 (2008). In the words of this court, "[t]his burden is not a light one." *Id*. The standard for permanent injunctive relief is even more exacting; as plaintiff itself concedes, actual success on the merits must be shown. Pl. Br. 9-10. To obtain permanent injunctive relief, "[a] plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (*cited in Wayne County Employees' Ret. Sys.*, Del. Ch., 954 A.2d 319, 329 (2008)). Far from meeting the substantial burden of proving these elements, plaintiff's claims are groundless.

## II. THE AMENDMENT IS NEITHER "FATALLY VAGUE" NOR "UNENFORCEABLE"

Plaintiff's motion does *not* contend that the Amendment was adopted for an illegitimate purpose, that the Amendment exceeds the Atmel board's authority under the DGCL or that it transgresses the reasonableness standard of *Unocal* or any other fiduciary norm. Rather, plaintiff mounts an unprecedented and purely academic facial challenge, contending that the [board] "violated its fiduciary duty" because the Amendment is "vague." Pl. Br. 1. "[A] shareholder," plaintiff speculates, "may be unable to determine the extent of its own Beneficial Ownership with any certainty." Pl. Br. 15. And, plaintiff continues, "Atmel has no reliable or objective means of knowing when the Poison Pill has been triggered." Pl. Br. 17. Indeed, plaintiff asserts, "it is impossible to objectively determine whether a particular contract even qualifies as a Derivatives Contract for purposes of the Amendment." Pl. Br. 18. Each of these assertions ignores the terms of the Rights Plan and injunctive relief should be denied on that ground alone.

### A. A stockholder will be able to determine the extent of its Beneficial Ownership and thus avoid inadvertently triggering the Rights Plan

It is a bedrock principle of contractual interpretation that language should be construed in accordance with its plain meaning. "Under Delaware law, courts interpret contracts to mean what they objectively say. This approach is long-standing and is motivated by grave concerns of fairness and efficiency." *Seidensticker* v. *Gasparilla Inn, Inc.*, 2007 WL 4054473, at *1 (Del. Ch. Nov. 8, 2007).[23] The "plain meaning" rule dooms plaintiff's argument.

[23] Defendants are submitting a compendium of unreported cases together with this brief. *See also* Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 32:11 (4th ed. 1993): "Consonant with the principle that all parts of a contract be given effect where possible, an interpretation

(footnote continued)

The Amendment provides that an investor will 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 . . . ; 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*.[24]

Accordingly, under the Amendment's plain language, 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 to that derivatives contract*. The receiving party under a TRS or any other derivatives contract involving 1,000 notional Atmel common shares would *under no circumstance* be deemed to beneficially own more than 1,000 Atmel common shares under that derivatives contract. Plaintiff mischaracterizes (or misreads) this plain language, asserting that a stockholder will be "imputed with ownership of not only the shares owned by its own counterparty on a Derivative [sic] Contract, but also those owned by its counterparty's counterparties, and by the counterparty's counterparties' counterparties, and so

(footnote continued)

which renders a contract lawful is preferred to those which render it unlawful. Similarly, interpretations which render the contract valid or its performance possible are preferred to those which render it invalid or its performance impossible. Interpretations which give a contract meaning are preferred to those which render it meaningless." (Citations omitted).

[24] Amendment § D (emphasis added). The Amendment defines "Notional Common Shares" as the number corresponding to the economic benefits and risks of a number of Atmel common shares. *Id*. In the context of a Derivatives Contract, defined in the Amendment as a "contract between two parties . . . 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," *id.*, the number of Notional Common Shares will be readily ascertainable. For example, the "notional amount" of the subject security under a TRS will be explicitly stated on the face of the contract. *See CSX Corp.*, 562 F. Supp. 2d at 519.

on." Pl. Br. 15. This is manifestly not the case: as the highlighted language above shows, beneficial ownership under a derivatives contract cannot exceed the notional number of Atmel shares covered by that contract.

Plaintiff dismisses the notional common shares limit as "illusory, since calculating the Notional Common Shares itself depends on numerous assumptions." Pl. Br. 16 n.9. This assertion is simply false. As Judge Kaplan explained in detail, derivatives contracts necessarily involve a "reference obligation" or "underlying asset." *CSX Corp.*, 562 F. Supp. 2d at 519. No "assumptions" are needed for a holder to determine the notional common shares referenced in a derivatives contract to which it is *itself* a direct party.

Far from having to "ferret out" any facts, to use plaintiff's term (Pl. Br. 8), the holder thus will always *know* that its beneficial ownership associated with a derivatives contract *cannot exceed* the number of shares referenced in that derivatives contract – i.e., the notional common shares. The notional common shares cap reflects general industry practice under which counterparties hedge their exposure. As Judge Kaplan found in *CSX*, whether or not contractually required to do so, the counterparties hedged their positions "on virtually a share-for-share basis and in each case on the day or the day following the commencement of each swap." 562 F. Supp. 2d at 541. And, this is precisely what the swapholder "contemplated and, indeed, intended":

> None of these counterparties is in the business, so far as running its swap desk is concerned, of taking on the stupendous risks entailed in holding unhedged short (or long) positions in significant percentages of the shares of listed companies. As a practical matter, the Court finds that their positions could not be hedged through the use of other derivatives. Thus, it was inevitable that they would hedge the TCI swaps by purchasing CSX shares.

*Id.* at 542 (footnote omitted). Of course, 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. A holder can reliably determine that by inquiring of its counterparty whether the contract is hedged and to what extent. Indeed, the holder can even require disclosure of such hedging by contract.[25]

Subject to the notional common shares cap, the number of securities beneficially owned by each counterparty ("Counterparty A") under a derivatives contract would 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 provision being applied to successive Counterparties as appropriate).[26] The reason for this provision is obvious: in its absence, a receiving party could easily avoid being deemed to have beneficial ownership simply by interposing an additional party (or additional parties) between it and the counterparty actually owning the underlying Atmel shares. For example, an activist could enter into a TRS on one million Atmel shares with a "Counterparty A" that owns no shares, but hedges its position by entering into a TRS on one million Atmel shares with a "Counterparty B" that beneficially owns one million Atmel shares. Counterparty A's "pass-through" position renders the synthetic arrangement substantially identical to a simple hedged TRS between the activist and Counterparty B, with all the attendant risks to Atmel, and therefore is pierced under the Amendment.

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[25] Derivative contracts typically follow a form established by the International Swaps and Derivatives Association, Inc. (ISDA), which contains basic representations and covenants that the parties may supplement as they see fit. *See CSX Corp.*, 562 F. Supp. 2d at 519 & n.11. They are "privately negotiated contracts" and "[t]heir terms may be varied during their lives as long as the counterparties agree." *Id.* at 523.

[26] Amendment § D.

By no means is a counterparty reduced to the hopeless state of confusion posited by plaintiff. A counterparty can contractually require the receiving party not to cross the Rights Plan triggering threshold, to close out its position prior to crossing the triggering threshold, or to bear the counterparty's cost of dilution should the Rights Plan be triggered. Indeed, under a TRS, a decline in the market price of the underlying security requires the receiving party to make payment of a corresponding amount to the counterparty. And, should the counterparty enter into a derivatives contract with another counterparty, the other counterparty likewise can require the first counterparty to close out the position before a triggering threshold is crossed or to bear the cost if the Rights Plan is triggered. In short, the problem that plaintiff poses as insurmountable can be overcome through contract and rational business practice.

In like fashion, absent the Amendment's application to derivatives contracts to which a stockholder's affiliates or associates are parties, one could easily evade the Rights Plan by having an affiliate or associate enter into a derivatives contract. Plaintiff decries this feature of the Amendment, Pl. Br. 15, but it is both manifestly necessary to avoid an "end run" around the Amendment and completely consistent with concepts of imputation of beneficial ownership to shares owned by affiliates and associates embodied in the traditional rights plans' definitions of beneficial ownership as it applies to outright ownership of shares, and vindicated decades ago in *Moran* v. *Household Int'l, Inc.*, Del. Ch., 490 A.2d 1059 (1985), *aff'd*, 500 A.2d 1346 (Del. 1985):

> [T]he 20% restriction if limited to individual ownership would fall short of the intended goal. Thus, the Plan extends the 20% triggering event to the formation of an ownership group, acting in concert for the purposes of a proxy contest. The group concept and beneficial ownership have been admittedly borrowed from comparable provisions in federal regulations under Sections 13(d) and 14(d) of the Securities Exchange Act of 1934.

490 A.2d 1059, 1080. To insist that these concepts are too vague to be enforceable would profoundly undermine settled rules and principles of corporate and securities law.[27]

### B. Disclosure of beneficial ownership of Derivatives Contracts is often required and the Rights are unexercisable absent such disclosure, such that the Rights Plan can always be orderly enforced

Plaintiff contends that the Amendment should be enjoined because Atmel cannot reliably determine, on an independent basis, when an investor has exceeded the Rights Plan's beneficial ownership threshold. Pl. Br. 17. This argument fails because not only would stockholders often be required to publicly disclose their economic interests in Atmel shares — particularly in the wake of *CSX* — but because even in circumstances where such disclosure would not be required, the Rights Plan could always be orderly enforced in time to serve its intended purpose.

Plaintiff mistakenly conflates the Rights Plan concepts of "Triggering Event" and "Distribution Date." In contending that the Rights Plan "may even have been triggered already – thereby causing chaos in the market for Atmel's shares," Pl. Br. 3., plaintiff conjures up mere shadows. The *exercisability* of the Rights is contingent upon a prior publicly announced event:

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[27] *See also* General Instruction C to Schedule 13D; Item 1008(a) of Regulation M-A under the Exchange Act, 17 C.F.R. § 229.1008(a). More recently, the proposed amendments to the DGCL noted above authorize bylaws to preclude director nominations by "any person if such person, or any nominee of such person, or any affiliate or associate of such person or nominee" had acquired or is proposing to acquire a specified percentage of the voting power of the corporation's outstanding voting stock. Adlerstein Aff. Ex. 7. Delaware law also restricts business combinations with interested stockholders, the latter being defined to include affiliates and associates. *See* 8 Del. C. § 203(c)(5). Furthermore, the form of the rights certificate included in the Rights Plan (which predates the Amendment) requires a party seeking to exercise the Rights to represent that neither it nor its Affiliates or Associates is an Acquiring Person, and that its Rights have not been beneficially owned by an Acquiring Person or an Affiliate or Associate of an Acquiring Person. Adlerstein Aff. Ex. 2 at B-7.

a "Distribution Date"[28] that occurs 15 days following the first date of a *public announcement* by Atmel or an "Acquiring Person" that an Acquiring Person has become such (the "Shares Acquisition Date").[29] The provision for a public announcement ensures that the Rights cannot become exercisable — and the board's ability to redeem the Rights cannot be divested[30] — until more than two weeks after a public announcement that the Acquiring Person threshold has been triggered. Thus, the Rights cannot become exercisable without the Atmel board's and the stockholders' — and the marketplace's — knowledge. In circumstances where a person has crossed the triggering threshold but has failed to publicly disclose the extent of its beneficial ownership, the exercisability of the Rights would be deferred until 15 days after that person takes a further step in its takeover effort, such as commencing a proxy fight or tender offer or filing a Schedule 13D, Form 3 or other public document, that results in disclosure of its ownership.

Plaintiff states that "[s]hareholders are not always required to publicly disclose their Derivative Contracts," Pl. Br. 17, implicitly conceding that stockholders sometimes *are* required to disclose their derivatives contracts. In particular, disclosure is specifically required under Item 6 of Schedule 13D,[31] which is required to be filed (and in circumstances including certain acquisitions and dispositions, amended) by a person beneficially owning 5% or more of the subject company's outstanding shares, and which, in the wake of *CSX*, may even be filed by a person whose exposure to the subject company's securities consists only of derivative

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28 *See* Rights Plan § 7(a) ". . . the registered holder of any Rights Certificate may exercise the Rights evidenced thereby (except as otherwise provided herein) in whole or in part at any time after the Distribution Date and prior to the Close of Business on the Expiration Date."

29 Rights Plan § 1(l).

30 *See* Rights Plan § 23.

31 17 C.F.R. § 240.13d-101.

securities. If material, a derivatives contract would be required to be disclosed in connection with a proxy contest, tender offer or exchange offer (as it was in *CSX*).[32] Moreover, in the case of a fully hedged derivatives contract with a notional amount equivalent to 5% or more of the subject company's outstanding shares, the counterparty would be required to file with the SEC a Schedule 13D, reporting the derivatives contract.[33] *Id.* In addition, pursuant to rules promulgated under Section 16 of the Exchange Act, any beneficial owner of more than 10% of a class of equity securities registered under Section 12 of the Exchange Act is required to file with the SEC a statement of change of beneficial ownership upon the acquisition or disposition of equity securities, including the acquisition or disposition of any "derivative security."[34] In the context of a tender or exchange offer, the offeror is required to disclose such material information, if any, as may be necessary to make the required statements in the offering document, in light of the circumstances under which they are made, not materially misleading.[35] The existence of a derivative interest in an issuer's securities would in many cases constitute material information.

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[32] Item 11 of Schedule TO, 17 C.F.R. § 240.14d-100; 17 C.F.R. § 229.1011(b); Rule 14a-9(a) under the Exchange Act, 17 C.F.R. § 240.14a-9(a).

[33] 17 C.F.R. § 240.13d-101. The apparent attempt by hedge funds to evade the 13D reporting requirements through structuring derivative contracts with multiple counterparties in which no single counterparty would have to hold 5% or more of CSX shares was part of the reason why the Court found a plan or scheme to evade the reporting requirements of Section 13(d), and therefore the hedge funds were deemed under Rule 13d-3(b) to have beneficial ownership of the shares owned by their counterparties for purposes of such section. *See* 17 C.F.R. § 240.13d-3(b); *CSX Corp.*, 562 F. Supp. 2d at 552.

[34] *See* Rule 16a-4 under the Exchange Act (17 C.F.R. § 240.16a-4). Under Rule 16a-1 under the Exchange Act, "derivative security" includes a "call equivalent position," defined as "a derivative security position that increases in value as the value of the underlying equity increases, including, but not limited to, a long convertible security, a long call option, and a short put option position." 17 C.F.R. § 240.16a-1.

[35] *See* Item 11 of Schedule TO under the Exchange Act, 17 C.F.R. § 240.14d-100.

Plaintiff's argument based on nondisclosure (Pl. Br. 12, 17) depends on the premise that raiders will conceal their derivative holdings absent a specific legal disclosure requirement. *See* Pl. Br. 17. This assumption posits that derivatives professionals act irrationally. After *CSX*, no corporate control contestant would likely use derivatives contracts as a means to avoid disclosure of beneficial ownership under Section 13(d). But even if it were assumed that a contestant for corporate control would run the legal risk of concealing its derivative positions, it would not imply that the Amendment would be invalid. By the same reasoning, one would be led to conclude that the laws against theft are impermissibly vague because the thief may conceal his misdeed. Similarly, under the Rights Plan in its pre-Amendment form, Atmel — like any company with a rights plan — would have had no means of knowing whether an investor exceeded the beneficial ownership threshold if the investor did not file a beneficial ownership report on Schedule 13D or otherwise publicly disclose its ownership. Indeed, one would be led to conclude that all rights plans would be invalid if Congress were to repeal the securities law requirement for disclosure of beneficial ownership of securities generally. There is nothing in the law of Delaware to suggest that the validity of rights plans turns on legally mandated disclosures.

The same is true in myriad contexts under the traditional rights plan wholly apart from the inclusion of derivative interests in the definition of beneficial ownership. The typical rights plan trigger aggregates shares held by members of a "group" within the meaning of Section 13(d) — and there may be no admission that a "group" has been formed (or, indeed, a denial of the requisite agreement to form a "group").[36] By the same token, there may be no public disclosure or may even be a dispute about whether party *X* is or is not an affiliate or associate of party *Y*, such that whether or not a rights plan has been triggered is not always "objectively" answerable or free from dispute.

In sum, Atmel often would be able to verify independently and immediately whether an activist has entered into a derivatives contract rendering it an "Acquiring Person," and in circumstances where it could not, the *exercisability* of the Rights would continue to hinge on the prior making of a public announcement, mitigating the specter of chaos paraded by plaintiff. Accordingly, the Atmel board's considered judgment that the Amendment would constitute an important and practical safeguard against abusive takeover tactics should not be upset.

## C. Whether a particular contract qualifies as a Derivatives Contract is objectively ascertainable

Plaintiff argues that "Derivatives Contract" is defined so vaguely as to render the Amendment unenforceable. To the contrary, the term is well-understood in today's financial world. The definition of "Derivative Contract" as a contract "designed to produce economic benefits and risks" corresponding "substantially" to the ownership of Atmel common shares is no more vague than any contractual term intended to describe arrangements that are functionally similar to one another but cannot be listed in roster form, nor is it more vague than commonly used terms such as "good and marketable title," "material adverse change," or, for that matter, "due process of law." And like those terms, it will be given a practical construction as

[36] Whether or not stockholders have entered into arrangements sufficient to constitute a "group" under Section 13(d) is frequently disputed. *See, e.g., CSX Corp.*, 562 F. Supp. 2d at 552; *Wellman* v. *Dickinson*, 682 F.2d 355, 362-67 (2d Cir. 1982).

circumstances warrant. Indeed, in describing the beneficial ownership provision in the proposed legislation, the synopsis of newly-introduced House Bill No. 19 states that "the bylaws may define beneficial ownership to take account of ownership of options *or other rights in respect of or relating to stock (including rights that derive their value from the market price of the stock).*" Adlerstein Aff. Ex. 7 (emphasis added). The Bill's definition, if anything, is less clearly articulated than the Amendment's definition of "Derivatives Contract" — belying plaintiff's insistence that the term is too vague to be understood. Indeed, Judge Kaplan noted in *CSX* that, "[i]n practical economic terms, a TRS . . . places the long party in substantially the same economic position that it would occupy if it owned the referenced stock or security," 562 F. Supp. 2d at 521 — essentially the same description used in the Amendment.

Ignoring the well-established market for financial derivatives, the vast literature describing that market, and Judge Kaplan's exegesis of market practices, plaintiff resorts to "www.businessdictionary.com" for a definition of "derivative contract," which discusses a contract for orange juice. Pl. Br. 7 n.5. Nothing in this definition suggests that the term "derivative contract" as used in the financial markets is so vague as to be meaningless. Plaintiff apparently finds the businessdictionary.com definition appealing because its (anonymous) author asserts that a derivatives contract "based on the price of certain shares" may have "nothing to do with the purchase of the shares." *Id.* at 8. Judge Kaplan's discussion of derivative contracts in the financial world, especially his findings with respect to the practical necessity of counterparty purchases of the subject shares in the context of large share accumulations, is a far more reliable guide to the meaning and general understanding of the term as it may be relevant to the Amendment.

Equally unpersuasive is plaintiff's assertion that the definition of "Derivatives Contract" is so vague as to potentially encompass an investment in a mutual fund or an exchange traded fund that holds Atmel common stock. Pl. Br. 18. No reasonable interpretation of the phrase "economic benefits and risks . . . that correspond substantially to the ownership . . . of a number of Common Shares" would suppose that the phrase refers to an investment in a diversified mutual or exchange traded fund. For example, as of March 9, 2009, 1.49% of the S&P North American Technology-Semiconductors Index Fund (IGW) consisted of Atmel common stock.[37] A $1,000 investment in this fund, which corresponds to ownership by the investor of $985.10 worth of securities other than Atmel stock, does not, on a plain reading, "correspond substantially" with the ownership of Atmel stock. Such an interpretation would also be inconsistent with the context and purpose of the Amendment and with the generally understood sense of the term "derivatives contract."

There is a world of difference between a definition that may require interpretation in occasional close cases and language that is so inherently vague as to be void. Plaintiff's "vagueness" argument ignores the teachings of the contract cases on which it relies (Pl. Br. 13-15): that, in deciding whether a contract is "ambiguous," the court should consider not only the "contract's language" and "meanings suggested by counsel," but also "extrinsic evidence offered in support of that interpretation," *Haft* v. *Dart Group Corp.*, 877 F. Supp. 896, 905 (D. Del. 1995), and whether the agreement is "susceptible of objective evaluation," *Most Worshipful Prince Hall Grand Lodge of Free and Accepted Masons of Del., Inc.* v. *Hiram Grand Lodge Masonic Temple, Inc.*, Del. Ch., 80 A.2d 294, 296 (1951). Plaintiff's argument that the term

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[37] *See* iShares, *S&P North American Technology-Semiconductors Index Fund (IGW) Daily Holdings*, http://us.ishares.com/product_info/fund/holdings/IGW.htm (last visited Mar. 10, 2009).

"Derivative Contract," as used in the Rights Plan, is "fraught with uncertainty," Pl. Br. 18, rests on nothing but hyperbole.

The contract cases on which plaintiff relies provide no support for its argument. First, none of the cases suggests that a contract approved by a board of directors, even if "vague," amounts to a breach of fiduciary duty. Second, in any event, none of the cases supports the proposition that the Amendment itself is vague or unenforceable. Rather, each turned on particular contractual clauses that under the circumstances of the applicable cases were judged too indefinite to be enforced. *Most Worshipful Grand* held the phrase in a stockholder agreement conditioning a voting right on the existence of "anything that would work harm to the corporation" to be too subjective to be enforceable. 80 A.2d at 295. *Haft* held that the terms "acquisition" and "equivalent basis" were *not* too ambiguous to be enforceable; 877 F. Supp. 896, 905-907 (D. Del. 1995); *Independent Cellular Telephone, Inc.* v. *Barker*, 1997 WL 153816, at *4, (Del. Ch. Mar. 21, 1997), held that terms in an oral agreement providing for a division of proceeds on the sale of a business were *not* too indefinite to be unenforceable. *Lynch & Assocs.* v. *Sweeten Contracting*, 1999 WL 743953, at *6 (Del. Super. Jul. 13, 1999), held that a contract specifying a "5% commission" was unenforceable because it did not specify "[f]ive percent of what." *In re Radiology Assocs., Inc. Litig.*, 1990 WL 67839 (Del. Ch. May 16, 1990), held that the phrase "There's always going to be a place in this practice" was too indefinite. Even further afield is *Hoover* v. *State of Delaware*, Del. Supr., 958 A.2d 816 (2008), *upholding* the constitutionality of a statute making it a criminal offense to operate a vehicle causing death.

### D. The Rights Plan contains provisions that would ameliorate any misapplication of the Amendment

Plaintiff characterizes the Amendment as "so steeped in uncertainty that no one — including the board itself" could determine whether the Rights Plan would be triggered on a specific set of facts (Pl. Br. 13), posing the threat of "chaos." Pl. Br. 3. Plaintiff's contention is not only inaccurate (as shown above), but also ignores provisions in the Rights Plan that would avoid the risk of potential misapplication of the contested provisions, notwithstanding their clarity.

First, the Rights Plan expressly provides Atmel's board with the exclusive power and authority to administer and make interpretations and determinations under the Rights Plan.[38] Accordingly, were an ambiguity to arise in a particular case, the Rights Plan provides a means of resolving the problem through board action. Also, the Rights Plan has always exempted from the definition of "Acquiring Person" a party that the board determines inadvertently became such, which further mitigates any concern that the Rights Plan would deter ordinary economic behavior.[39]

Second, the Rights Plan provides that prior to the occurrence of a Distribution Date — fifteen days *after* a public announcement that a person has become an Acquiring Person — Atmel may supplement or amend the Rights Plan "in any respect without the approval of any holders of Rights" and that following a Distribution Date, Atmel and the Rights Agent may supplement or amend the Rights Agreement without the approval of any holders of Rights

38 *See* Rights Plan § 29: "The Board of Directors of the Company shall have the exclusive power and authority to administer this Agreement and to exercise all rights and powers specifically granted to the Board, or the Company, or as may be necessary or advisable in the administration of this Agreement, including, without limitation, the right and power to (i) interpret the provisions of this Agreement and (ii) make all determinations deemed necessary or advisable for the administration of this Agreement (including a determination to redeem or not redeem the Rights or to amend the Agreement). All such actions, calculations, interpretations and determinations (including, for purposes of clause (y) below, all omissions with respect to the foregoing) which are done or made by the Board in good faith, shall (x) be final, conclusive and binding on the Company, the Rights Agent, the holders of the Rights Certificates and all other parties and (y) not subject the Board to any liability to the holders of the Rights."

39 *See* Rights Plan § 1(a).

in order to, among other things, cure any ambiguity.[40] In short, a clear path exists to avoid a misapplication of the Amendment's text in the unlikely event that it were necessary to do so.

Third, the Rights Plan permits Atmel, at its option and with the approval of the Atmel board, at any time prior to the close of business on the fifteenth day following the public announcement that an Acquiring Person has become such, to redeem all of the Rights.[41] This provision constitutes yet another safety valve available to avert misapplication of the Amendment.

In sum, the Rights Plan reserves substantial discretion to the board to administer the Rights Plan in good faith in the best interests of Atmel's stockholders. This is in diametric opposition to limits on board authority imposed by the six-month "delayed redemption provision" at issue in *Quickturn Design Systems, Inc.* v. *Shapiro*, Del. Supr., 721 A.2d 1281 (1998), and the "dead hand" provision at issue in *Carmody* v. *Toll Bros., Inc.*, Del. Ch., 723 A.2d 1180 (1998), the cases on which plaintiff relies.

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At bottom, this motion asks this Court to blind itself to marketplace realities. Investors and corporate boards know what derivatives contracts are and understand their potential uses in contests for corporate control. Like the arguments rejected by Judge Kaplan in *CSX*, plaintiff's arguments here exalt "form over substance." Judge Kaplan refused the invitation to do so, observing:

> The securities markets operate in the real world, not in a law school contracts classroom. Any determination of beneficial

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40 *See* Rights Plan § 27.

41 *See* Rights Plan § 23.

> ownership that failed to take account of the practical realities of that world would be open to the gravest abuse.

562 F. Supp. 2d at 547. Boards of directors likewise operate in the real world, and cannot fail to take account of those practical realities — as evidenced by the recently proposed amendments to the DGCL to take derivative contracts into account. The court in *CSX*, the Council of the Corporation Law Section of the Delaware State Bar Association, the Atmel board and the boards of other Delaware companies have recognized and responded to this problem.

The Delaware Supreme Court in *Unocal Corp.* v. *Mesa Petroleum Co.*, Del. Supr., 493 A.2d 946, 951 (1985), admonished that "our corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs." It would turn this admonition on its head for this Court to rule that the logical and sensible development represented by the Amendment was at odds with applicable Delaware law.

## III. AN INJUNCTION SHOULD BE DENIED BECAUSE PLAINTIFF'S "VAGUENESS" CHALLENGE TO THE AMENDMENT IS TOO HYPOTHETICAL TO BE JUSTICIABLE AND PLAINTIFF HAS NOT MET THE EQUITABLE STANDARDS FOR INJUNCTIVE RELIEF

### A. Plaintiff's claim is nonjusticiable

Plaintiff's facial attack on the Amendment, presented in a factual vacuum, is unprecedented and ill-advised. It breaks new ground from all of the rights plan cases plaintiff cites, each of which presented a straightforward claim that a rights plan provision or amendment was either ultra vires under the DGCL or violated fiduciary standards against disloyal director action taken solely or primarily for entrenchment purposes. *Quickturn*, 721 A.2d at 1291 (challenge to "no hand" or "delayed redemption provision" under 8 Del. C. § 141(a) and the "concomitant fiduciary duty pursuant to that statutory mandate"); *Toll Brothers*, 723 A.2d 1180 (challenge to "dead hand" provision under 8 Del. C. §§ 141(a) and (d) and fiduciary duty of loyalty under *Blasuis* and *Unocal*); *In re Chrysler Corp. S'holders Litig.*, 1992 WL 181024 (Del. Ch. Jul. 27, 1992) (challenge to trigger reduction on entrenchment grounds).[42]

More fundamentally, there is no precedent and no warrant for a stockholder to challenge a rights plan provision (or a provision of any other corporate document, e.g., charter, by-law, contract) not on statutory or fiduciary grounds, but by positing the possibility that there may one day somehow arise a set of circumstances in which the application of the provision is "vague" and assert that "its adoption therefore constituted a *per se* breach of fiduciary duty." Pl. Br. 10.

Absent any precedent supporting its position, plaintiff is forced to argue that the asserted "vagueness" of the Amendment renders it invalid "for analogous reasons," referring to private contract cases. Pl. Br. 13. The asserted analogy is entirely hollow.

Plaintiff principally relies on the 1951 decision in *Most Worshipful Grand*, 80 A.2d 294. Chancellor Seitz there addressed a stockholders' petition to review an election of directors in which the plaintiff's shares were subject to an agreement that denied it the right to vote except in "cases of misgovernment of the Trustees, or anything that would work harm to the corporation." The Chancellor ruled that the latter clause was not "reasonably definite":

> Nowhere in the agreement is there any standard by which the quoted language can be rendered more definite. . . . Is the standard to be subjective or objective? Certainly stockholders can have innumerable diverse yet honest opinions as to whether a particular action is or is not working harm to their interest. So many factors

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[42] Moreover, in the two decisions that did not involve an ongoing takeover bid threatened by the challenged provisions (*Chrysler* and *Toll Brothers*), the court denied motions to dismiss without reaching the appropriateness of affirmative relief. *Chrysler*, indeed, addressed only whether the "entrenchment" challenge to a rights plan trigger reduction (from 20% to 10%) survived a motion to dismiss on Rule 23.1 demand futility grounds. The court did not decide whether the plaintiff could be entitled to affirmative relief but, notably, dismissed the money damages claim on ripeness grounds. *Id*. at *3. Here, of course, no "entrenchment" claim is advanced (and plaintiff disclaims reliance on *Unocal*; *see* Pl. Br. 12).

> could constitute the basis for a decision by a stockholder that certain corporate action was doing harm that no court could fairly substitute its judgment for that reached by plaintiff-stockholder. . . . Suppose plaintiff were to say that the mere continuance of the present management, without more, was working harm. Could the court overrule that decision? I think not under the language here employed and in view of the intangible factors involved.

*Id*. at 295-296. Manifestly, leaving aside the demonstrable clarity of the Amendment here, nothing in the Chancellor's decision suggests that any hypothetical "vagueness" that a stockholder can conjure up in a corporate instrument — whether or not actually at issue — creates some "*per se*" fiduciary breach sufficient to support a roving power of injunction based on nothing more than a plaintiff-stockholder's imagination.

Likewise, none of the cases plaintiff cites involved the academic positing of a possible hypothetical scenario claimed to result in some "uncertainty" or "vagueness" in the application of particular contractual terms. And, of course, none remotely suggests that any type of "vagueness" in a corporate contract or other instrument — whether real, imagined or conjured — equates to a "*per se* breach of fiduciary duty." *See supra* pp. 31-32.[43]

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[43] Analogy to constitutional First Amendment principles of vagueness and overbreadth is instructive. Even where core freedom of expression is alleged to be chilled by a vague or overbroad statute — that is, unlike here, even where the challenged rule is inherently suspect — courts refuse to consider facial challenges absent such extreme vagueness or overbreadth that the statute clearly regulates far more constitutionally protected speech than unprotected speech. *See, e.g.*, *Virginia* v. *Hicks*, 539 U.S. 113 (2003). This doctrine recognizes that virtually every law regulating speech may be vague as applied to certain factual circumstances; that drafters cannot reasonably anticipate every possible application; and that any contrary rule would unreasonably interfere with the legislators' appropriate power to effectively regulate within their prescribed authority. *See, e.g., Hicks,* 539 U.S. 113 at 119; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-16 (1973). The same principle applies to plaintiff's facial attack on the Amendment. Like statutes, corporate documents and board policies (including the Amendment at issue here), no matter how carefully crafted, will inevitably be uncertain as applied to some conceivable set of circumstances. To hold that such documents may be invalidated simply upon such a showing would subject the board's authority under section 141(a) to the veto of any stockholder who can imagine a scenario wherein the instrument's application might be alleged to be "vague" or "indeterminate." That course would unduly curtail the board's statutory obligation to manage the corporation's business and affairs and deprive

(footnote continued)

In the final analysis, plaintiffs' motion is fundamentally doubly misguided. The "vagueness" plaintiff's brief asserts is chimerical. And the whole premise of plaintiff's motion is nothing more, or less, than an ill-advised invitation for the courts to sanction free-floating hypothetical facial challenges that should be equally rejected as inappropriate and non-justiciable.

**B. <u>The absence of irreparable harm and the balance of hardship</u>**

Plaintiff suggests that the Amendment is causing plaintiff and Atmel to suffer irreparable harm in two respects: the risk that the Rights Plan may be triggered "inadvertently" may cause "chaos" in the market for Atmel shares, and the assertion that the Amendment's "unpredictable" application is likely to "deter" acquisition proposals and proxy contests. Pl. Br. 3, 20-21. Neither assertion has merit, even putting aside that plaintiff's "vagueness" claim is so much *ipse dixit*.

Even if there were some "uncertainty" about the meaning of the Amendment, plaintiff made no showing indicating *any* imminent threat of an "inadvertent" triggering of the Rights, much less of one that could not be rectified by the Atmel board. Moreover, for reasons unrelated to the Amendment, there is no possibility of a proxy solicitation prior to the expiration of the Rights Plan in October 2009. The time for submission of proposals for Atmel's 2009 annual stockholders' meeting has expired; Atmel's by-laws do not permit stockholders to call

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(footnote continued)

stockholders of the protections of active and empowered management. For these reasons, "facial" challenges can be appropriate only when a corporate instrument is ultra vires of express statutory command or entirely irreconcilable with a fiduciary duty mandate.

special meetings, and Microchip — although by its public statements undeterred by the Amendment — has withdrawn its stockholder proposals.[44]

Even if there were a possibility of a proxy solicitation prior to the Rights Plan's expiry, Delaware law recognizes that a rights plan's existence does not unlawfully restrict stockholders' rights to conduct a proxy contest or stockholders' ability to receive tender offers.[45] Indeed, plaintiff's assertion that inclusion of derivatives in the definition of beneficial ownership interferes with proxy contests, Pl. Br. 21, is a tacit admission that Atmel was correct in viewing derivatives as proxy contest weapons notwithstanding the absence of formal voting rights in the triggers based on derivatives contracts. Given that the Delaware courts have recognized rights plans with 20% triggering thresholds do not unlawfully interfere with proxy contests, there is no basis to argue that derivative contracts with notional amounts equivalent to 20% would be any more likely to interfere. The Rights carry a 10% trigger in the limited instance of an acquiror who has made a bid for control, but the only evidence on the effect of this provision is that the Amendment did not discourage the only entity that has made a bid — Microchip, which reaffirmed its bid and announced a proxy solicitation after Atmel adopted the Amendment, only to later withdraw for unrelated reasons.

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44 Atmel's preceding annual stockholders' meeting was held on May 14, 2008 and under Atmel's bylaws, stockholder proposals for the 2009 annual meeting must have been received by Atmel not less than 120 days before the one-year anniversary on which Atmel first mailed its proxy statement to stockholders in connection with the previous year's annual meeting of stockholders, which was December 16, 2008. *See* Atmel's Amended and Restated Bylaws, Adlerstein Aff. Ex. 13, § 2.2.

45 *See Account* v. *Hilton Hotels Corp.*, Del. Supr., 780 A.2d 245, 249 (2001) ("This Court also determined that the rights plan did not 'usurp stockholders' rights to receive tender offers'. . . . Finally, we held that the rights plan would not have the unauthorized effect of restricting stockholders' rights to conduct a proxy contest.") (internal citations omitted).

Plaintiff's motion should also be denied because the balance of harms disfavors injunctive relief. Plaintiff can point to no harm that it would suffer from the denial of injunctive relief whereas the grant of injunctive relief would deprive Atmel and its stockholders of the Amendment's protections against stealth takeovers. Moreover, injunctive relief would disserve public interests by casting a cloud over rights plan provisions adopted by a number of other companies to deter derivatives-driven takeover efforts, and on the validity of the newly-introduced Delaware House of Representatives Bill No. 19 to include derivative holdings in the definition of beneficial ownership for purposes of stockholder access bylaws.

To quote Judge Kaplan again, "the Cassandra-like predictions of dire consequences" of holding a control contestant to have "beneficial ownership [for reporting purposes] . . . have been exaggerated . . . ." *CSX Corp.*, 562 F. Supp. 2d at 547. Invoking fanciful hypotheticals in which the application of a rights plan provision would be disputable is a far cry from showing the actual existence of irreparable harm necessary to obtain the extraordinary remedy of injunctive relief, let alone irreparable harm that would outweigh the harm that would flow from invalidating provisions intended to reinforce the ability of boards of directors to fulfill their fiduciary duties in the face of new takeover techniques.

## CONCLUSION

For all the foregoing reasons, defendants respectfully request that the Court deny plaintiff's motion for injunctive relief in its entirety.


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