

THE POISON PILL: ARE SHAREHOLDER RIGHTS STILL
PROTECTED?

BY: MARGARET K. RYDER

I. INTRODUCTION	630
<i>A. What is a Poison Pill?</i>	631
II. BACKGROUND AND EVOLUTION OF THE POISON PILL DEFENSE.....	632
<i>A. Regulating Mergers and Acquisitions</i>	633
1. Delaware General Corporation Law.....	634
2. Director Approval and the Business Judgment Rule.....	635
<i>B. Key Developments</i>	636
III. KEY FEATURES.....	638
<i>A. Occurrence of a Triggering Event</i>	638
1. The Front-End Loaded, Two-Tiered Tender Offer	639
<i>B. Adoption by the Board of Directors</i>	640
1. The Board of Directors' Right to Redeem	640
2. The Fundamental Rights of Shareholders	642
IV. THE DIFFERENT VARIATIONS OF POISON PILLS	643
<i>A. The Flip-Over Provision</i>	644
<i>B. The Flip-In Provision</i>	646
<i>C. The Back-End Provision</i>	648
1. The Put Pill.....	648
2. The Value Assurance Pill.....	649
<i>D. The Exchange Option</i>	649
<i>E. The Dead Hand Provision</i>	651
1. The No Hand Variation	652
2. Surrounding Controversy	652
V. THE BID TO PURCHASE TWITTER AND THE EFFECTS ON ITS SHAREHOLDERS	654
VI. CONCLUSION: ARE SHAREHOLDERS STILL PROTECTED?	658

I. INTRODUCTION

On April 4, 2022, a regulatory Securities and Exchange Commission (“SEC”) filing showed that Elon Musk (“Musk”) became the leading shareholder of Twitter, Inc. (“Twitter”) after acquiring 73.5 billion shares of the company.¹ At that time, Musk controlled approximately 9% of Twitter’s stake.² Then, on April 14, 2022, another SEC filing revealed that Musk made an unsolicited offer to buy Twitter for approximately \$44 billion.³ To protect itself, Twitter adopted a poison pill to be triggered upon shareholder acquisition exceeding 15% of the company without board approval.⁴ In an attempt to halt a takeover, Twitter’s board of directors unanimously adopted the defense,⁵ which will be in place for a limited duration of one year.⁶ However, as in Twitter’s case, the adoption of a poison pill is not an absolute indication that the corporation will not get purchased.⁷ After negotiations, the parties came to an agreement in which Musk would purchase all of Twitter for \$44 billion and take the company private.⁸ Subsequently, Twitter’s shareholders filed a class action lawsuit against both Twitter and Musk⁹ and after Musk complicated the deal, Twitter sued him.¹⁰ Although the litigation between Twitter and Musk ultimately resulted in Twitter’s purchase, the poison pill and its effects are further discussed in Section V of this Comment.

¹ *A Timeline of Billionaire Elon Musk’s Bid to Control Twitter*, ASSOCIATED PRESS (June 6, 2022), <https://apnews.com/article/elon-musk-twitter-inc-technology-social-media-8b3fc21b1002390a6bc98bfce70e0654> [hereinafter *Timeline*] (valued at \$3 billion).

² *Id.*

³ *Id.*

⁴ Krishna Veera Vanamali, *What is a ‘Poison Pill’ Strategy & Why has Twitter Adopted One?*, BUSINESS STANDARD, https://www.business-standard.com/podcast/management/what-is-a-poison-pill-strategy-why-has-twitter-adopted-one-122041900048_1.html (last updated Apr. 18, 2022, 9:06 PM).

⁵ *Timeline*, *supra* note 1.

⁶ Vanamali, *supra* note 4.

⁷ Christine Hurt, *The Hostile Poison Pill*, 50 U.C. DAVIS L. REV. 137, 150 (2016); see also Adam Hayes, *Poison Pill Defense: How Companies Fight Off a Takeover Bid*, INVESTOPEEDIA: CORPORATE FINANCE, <https://www.investopedia.com/terms/p/poisonpill.asp> (last updated Oct. 23, 2022).

⁸ *Timeline*, *supra* note 1.

⁹ Lisa Kolodny, *Twitter Shareholders Sue Elon Musk and Twitter Over Chaotic Deal*, CNBC: TECH, <https://www.cnbc.com/2022/05/26/twitter-shareholders-sue-elon-musk-and-twitter-over-chaotic-deal.html> (last updated May 26, 2022, 9:19 PM).

¹⁰ See generally *Compl.*, *Twitter, Inc. v. Elon R. Musk et al.*, No. 2022-0613, Del. Ch. 2022 (filed July 12, 2022) [hereinafter *Compl.*].

A. *What is a Poison Pill?*

The poison pill is a defensive strategy adopted by target corporations and used to protect the corporation and its shareholders against unwanted tender offers.¹¹ Poison pills, formally known as shareholder rights plans, were invented in 1984 and changed the world of hostile takeovers.¹² The defense was established in the 1980s during the corporate takeover era and in the mid-1990s during the substantial merger and acquisition (“M&A”) activities.¹³ The pill became one of the most common defensive devices¹⁴ and one of the most effective strategies to increase the value of shareholders.¹⁵

New York attorney, Martin Lipton, brought fame to the anti-takeover devices,¹⁶ which were upheld in *Moran v. Household International, Inc.* by the Delaware Supreme Court in 1985.¹⁷ The Court established that when reviewing challenges to poison pill defenses brought by shareholders, intermediate scrutiny applies.¹⁸

By 2000, some variation of a poison pill had been adopted by more than 2,500 companies.¹⁹ A board of directors will adopt a poison pill to cause significant dilution to the ownership of the acquiror.²⁰ Moreover, a legitimate poison pill can prevent tender offers, but the defense does not categorically eliminate them.²¹

This Comment discusses the poison pill in detail and whether the adoption of a poison pill by a board of directors, in effect, lessens the value of certain shareholder rights. Thus, the question presented itself. If a board

¹¹ Xueqing L. Ji, Comment, *A New Look at Dead Hand Provisions in Poison Pills: Are They Per Se Invalid After Toll Brothers and Quickturn?*, 44 ST. LOUIS U. L.J. 223, 223–24 (2000).

¹² *Id.*; see also Julian Velasco, *Just Do It: An Antidote to the Poison Pill*, 52 EMORY L.J. 849, 851 (2003) [hereinafter Velasco, *Just Do It*].

¹³ Ji, *supra* note 11, at 223–24.

¹⁴ Ji, *supra* note 11, at 224.

¹⁵ Ji, *supra* note 11, at 224.

¹⁶ Addison D. Braendal, *Defeating Poison Pills Through Enactment of a State Shareholder Protection Statute*, 25 DEL. J. CORP. L. 651, 655 (2000).

¹⁷ 500 A.2d 1346 (Del. 1985). 500 A.2d 1346 (Del. 1985).

¹⁸ *Moran v. Household Int’l, Inc.*, 500 A.2d 1346, 1357 (Del. 1985); see *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

¹⁹ Braendal, *supra* note 16, at 655; Ji, *supra* note 11, at 224.

²⁰ Albert O. “Chip” Saulsbury, IV, *The Availability of Takeover Defenses and Deal Protection Devices for Anglo-American Target Companies*, 37 DEL. J. CORP. L. 115, 137 (2012).

²¹ Hurt, *supra* note 7, at 150 (“[A] shareholder rights plan should leave open the possibility that, even with the pill in place, a bidder could launch a successful proxy contest and replace the board of directors.”); MARTIN LIPTON & ERICA H. STEINBERGER, TAKEOVERS & FREEZEOUTS § 6.03[2] (2021) (“Rights plans do not interfere with negotiated transactions, nor do they preclude unsolicited takeovers.”).

can adopt and use a poison pill as a defensive strategy without a majority vote by the shareholders, where does that leave the fundamental rights to vote, elect, and sue?

II. BACKGROUND AND EVOLUTION OF THE POISON PILL DEFENSE

In the mid-1980s, target corporations deemed it necessary to consider protective defenses to combat the corporate takeovers resulting in the formation of the poison pill.²² Furthermore, the overwhelming M&A activity during the 1990s resulted in corporations wanting to protect their shareholders' interests against unwanted and unwarranted takeover offers.²³ Between 1990 and 1996, domestic M&A totaled a tremendous \$2.225 trillion.²⁴ The evolution and increase of takeover strategies continued; some of which put shareholders at a deficit.²⁵ The disadvantages would cause target corporations to evolve their defensive strategies to combat hostile takeover bids.²⁶

In response to unsolicited takeover bids, a target corporation, via its board of directors, may engage in various defensive measures.²⁷ When compared to other, Delaware courts analyze the motivations and processes behind a target corporation's decisions to respond defensively.²⁸ While, other courts traditionally allow broad leeway to a board of directors and the decisions a board makes.²⁹

A poison pill is easily implemented and done so without approval of a corporation's shareholders.³⁰ Commonly, a corporation's board "declares a dividend of share purchase rights and enters into a shareholder rights agreement with a rights agent."³¹ The rights then attach to a corporation's common stock and stay passive until triggered.³² Activation is triggered once a shareholder exceeds a fixed percentage, often 15% of

²² Ji, *supra* note 11, at 228–29.

²³ Dennis J. Block et al., *Defensive Measures in Anticipation of and in Response to Unsolicited Takeover Proposals*, 51 U. MIAMI L. REV. 623, 623 (1997) ("The total for 1996 alone was \$658.8 billion." (citation omitted)).

²⁴ *Id.*

²⁵ Ji, *supra* note 11, at 228–29 (emphasizing the disadvantage to individual shareholders).

²⁶ Ji, *supra* note 11, at 228–29.

²⁷ Block et al., *supra* note 23, at 623–24 ("Some measures can best be implemented prior to the receipt of an unsolicited bid. Other techniques may be employed in response to a threatened or actual hostile bid after it has been made.").

²⁸ Block et al., *supra* note 23, at 624.

²⁹ Block et al., *supra* note 23, at 624.

³⁰ Braendal, *supra* note 16, at 655.

³¹ Braendal, *supra* note 16, at 655.

³² Braendal, *supra* note 16, at 655.

the corporation's outstanding common stock.³³ Once active, the purchase rights will detach from the common shares and the newly issued shares of stock can be purchased by other shareholders at a fractional price; thus, diluting the stock of the acquiring shareholder.³⁴

The most effective poison pills are a combination of flip-over and flip-in provisions,³⁵ which will be discussed in greater detail in Section IV. A flip-over pill allows “shareholders to buy shares in the acquiror at a designated price,” while a flip-in pill “allows the target company shareholders other than the acquiror to purchase target stock cheaply.”³⁶

A. Regulating Mergers and Acquisitions

In the United States, most corporations elect to incorporate in Delaware.³⁷ Since the early 1900s, Delaware has been the go-to state for business entity formation.³⁸ Many of those corporations include those listed on major stock exchanges,³⁹ and of those corporations, more than 60% of Fortune 500 companies are incorporated in Delaware.⁴⁰

Furthermore, tender offers⁴¹ are largely regulated by the SEC, which assesses corporations' compliance with disclosure rules.⁴² Notably, however, the SEC does not regulate a board's response to a takeover bid, leaving that regulation to common law.⁴³ A line of Delaware decisional law has developed regulations for the decisions made by a board during a merger or acquisition.⁴⁴

³³ Braendal, *supra* note 16, at 655.

³⁴ Braendal, *supra* note 16, at 655.

³⁵ *Martin Lipton In Defense of the Poison Pill*, No. 227, CORP. GOVERNANCE GUIDE, Sept. 9, 1997, at 1, 1997 WL 35392059 [hereinafter *Martin Lipton*].

³⁶ *Id.*

³⁷ *Why Businesses Choose Delaware*, DELAWARE CORPORATE LAW, <https://corplaw.delaware.gov/why-businesses-choose-delaware/> (last visited Apr. 18, 2023).

³⁸ *Id.* (to date, more than one million businesses have chosen Delaware as a home base for their legal formation).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ A public offer to purchase shares of a corporation, often above the shares' market price, and the offer is associated with an intent to gain a majority and controlling interest in a target company. Tender Offer, WEX, https://www.law.cornell.edu/wex/tender_offer (last updated Mar., 2022) (explaining the SEC requires any acquiror making a tender offer over 5% of a corporation's shares to file disclosures).

⁴² John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1743 (2007); see Saulsbury, *supra* note 20, at 118.

⁴³ Armour & Skeel, *supra* note 42, at 1743 (explaining that board response is “regulated primarily by state courts—which usually means Delaware’s Chancery judges and Supreme Court.”); see Saulsbury, *supra* note 20, at 118.

⁴⁴ Saulsbury, *supra* note 20, at 118.

Business entities choose to incorporate in Delaware for numerous reasons, including Delaware's case law.⁴⁵ Embodied in case law, and remaining vital to business formation, is the business judgment rule,⁴⁶ which is a presumption afforded to a board of directors making business decisions.⁴⁷ In *Unocal Corp. v. Mesa Petroleum Co.*, the Delaware Supreme Court defined the business judgment rule as:

[A] presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter's decision can be attributed to any rational business purpose.⁴⁸

The presumption is only afforded when a majority of the board has no conflicting interest with the decision being made, and without conflict, the court will not question whether the decision was made "with due care and in good faith."⁴⁹

1. Delaware General Corporation Law

In Delaware, a board of directors manages the business affairs of a corporation, unless there is an exception available.⁵⁰ Pursuant to Section 141(a) of the Delaware General Corporation Law ("DGCL") a corporation's board of directors handles and directs the company's business and affairs.⁵¹ Along with this power, the board owes fiduciary

⁴⁵ *Why Businesses Choose Delaware*, *supra* note 37.

⁴⁶ *Why Businesses Choose Delaware*, *supra* note 37.

⁴⁷ *The Delaware Way: Deference to the Business Judgment of Directors Who Act Loyally and Carefully*, DELAWARE CORPORATE LAW, <https://corplaw.delaware.gov/delaware-way-business-judgment/> (last visited Apr. 18, 2023); *see Why Businesses Choose Delaware*, *supra* note 37 (explaining a corporation's board of directors ultimately has the power and the duty to make "business decisions" for the company).

⁴⁸ 493 A.2d 946, 954 (Del. 1985).

⁴⁹ *The Delaware Way*, *supra* note 47 (explaining that when stating "a majority of the directors have no conflicting interest" the duty of loyalty applies).

⁵⁰ DEL. CODE ANN. tit. 8, § 141(a) (2020).

⁵¹ The section reads:

The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or

duties to the corporation and its shareholders.⁵² However, Section 109(b) allows a corporation’s bylaws to include provisions relating to the business and affairs of the company and “its rights or powers or the rights or powers of its stockholders, directors, officers or employees.”⁵³

However, those two sections of the DGCL create conflict—whether shareholders can create and adopt bylaws that limit a corporation and its board of directors’ use of poison pills.⁵⁴ Without those bylaws, a corporation’s shareholders cannot do much to prevent or adopt a defensive strategy.

Pursuant to Delaware law, a shareholder can file a derivative suit to challenge decisions made by a board of directors.⁵⁵ In a derivative suit, a shareholder asserts that the board of directors’ negligence or mismanagement led to economic loss to the corporation.⁵⁶

2. Director Approval and the Business Judgment Rule

A board of directors must approve an M&A transaction.⁵⁷ Under Section 251, once a board of directors “adopt[s] a resolution approving the M&A and declaring its advisability,”⁵⁸ then the shareholders must approve the resolution by a majority vote.⁵⁹ However, a shareholder vote is not necessary to adopt and use a poison pill.⁶⁰ Although Section 251 of the DGCL provides a corporation’s board of directors the authority to approve or to make recommendations about an M&A,⁶¹ customarily under

imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.

Id.

⁵² Saulsbury, *supra* note 20, at 119 (adding that “in the context of mergers and acquisitions, the directors of target companies owe a fiduciary duty of care to the shareholders during the sale of the company.”).

⁵³ DEL. CODE ANN. tit. 8, § 109(b) (2020).

⁵⁴ Velasco, *Just Do It*, *supra* note 12, at 851.

⁵⁵ Saulsbury, *supra* note 20, at 119 (allowing “shareholders to sue in the corporation’s name where those in control of the company refused to assert a claim belonging to it.” (citation omitted)).

⁵⁶ Saulsbury, *supra* note 20, at 119.

⁵⁷ DEL. CODE ANN. tit. 8, § 251(a) (2020).

⁵⁸ *Id.*

⁵⁹ DEL. CODE ANN. tit. 8, § 251(c) (2020).

⁶⁰ Brian J. McTear, Comment, *Has the Evolution of the Poison Pill Come to an End?—Carmody v. Toll Brothers, Inc.; Mentor Graphics, Inc. v. Quickturn Design Systems, Inc.*, 24 DEL. J. CORP. L. 881, 885 (1999); *see also* Braendal, *supra* note 16, at 655.

⁶¹ DEL. CODE ANN. tit. 8, § 251(b), (c) (2020).

Delaware corporate law, “the board has been given no statutory role in responding to a public tender offer.”⁶²

In Delaware, a board owes fiduciary duties to both the corporation and its shareholders.⁶³ And during an M&A, a target board of directors owes the fiduciary duty of care to its shareholders throughout the sale;⁶⁴ however, a board of directors is generally given protections under the business judgment rule.⁶⁵

Thus, Delaware courts will be deferential to a corporation’s business decisions and grant its board of directors’ business judgment rule protections.⁶⁶ But before its protections apply, the board needs to satisfy *Unocal*’s enhanced scrutiny standard when adopting a poison pill defense.⁶⁷ That occurs only if the board has a legitimate business reason for rejecting or accepting the tender offer⁶⁸ and the decision must be made on an informed basis and in good faith.⁶⁹

B. Key Developments

In *Unocal*, the Delaware Supreme Court defined the business judgment rule and connected the rule to hostile takeovers.⁷⁰ Additionally, the Court held that in a situation in which a corporation is faced with a hostile bid and the board responds defensively, the analysis starts with the board’s fiduciary duty of care.⁷¹ The Court further explained, however, that those corporate powers are not absolute.⁷²

The Court reasoned that “[b]ecause of the omnipresent specter that a board may be acting primarily in its own interest, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for

⁶² Saulsbury, *supra* note 20, at 129–30 (citing *Air Prods. and Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 91–92 (Del. Ch. 2011)).

⁶³ Saulsbury, *supra* note 20, at 119.

⁶⁴ Saulsbury, *supra* note 20, at 119.

⁶⁵ Saulsbury, *supra* note 20, at 131.

⁶⁶ Saulsbury, *supra* note 20, at 131.

⁶⁷ *McTear*, *supra* note 60, at 887–88 (“The application of the *Unocal* standard to defensive measures is a crucial issue for determining whether adopting variations of the poison pill is a valid exercise of the board’s authority.”).

⁶⁸ Saulsbury, *supra* note 20, at 132.

⁶⁹ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985); Saulsbury, *supra* note 20, at 119.

⁷⁰ *Unocal*, 493 A.2d at 954.

⁷¹ *Id.* at 955 (explaining “the basic principle that corporate directors have a fiduciary duty to act in the best interest of the corporation’s stockholders.” (citing *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939)).

⁷² *Id.* (reasoning that corporations do not have unrestricted discretion to combat any potential threat to the corporation by any means possible).

judicial examination at the threshold before the protections of the business judgment rule may be conferred.”⁷³ Stated differently, *Unocal* established what is known as the “enhanced business judgment rule” standard,⁷⁴ which requires decisions made by a board of directors meet intermediate scrutiny,⁷⁵ as opposed to the usual rational basis standard.⁷⁶

Upon addressing a hostile offer, a board is obligated to establish that the offer is in the best interest of the corporation and its shareholders.⁷⁷ If the decision by the board of directors is not in the best interest of the corporation or its shareholders, the board has breached its fiduciary duty of care.⁷⁸ The duty of care extends to cover both the corporation and its owners from any threat of harm.⁷⁹

In *Unocal*, the Court developed a two-prong test to determine whether a decision to deploy defensive measures in response to a hostile offer was proper.⁸⁰ Under the analysis, the target board must show: (1) it had “reasonable grounds for believing a danger to corporate policy and effectiveness existed”;⁸¹ and (2) its response was “reasonable in relation to the threat posed.”⁸²

After the creation of poison pills in the 1980s as a response to front-end loaded, two-tiered tender offers,⁸³ litigation ensued regarding the defense’s validity.⁸⁴ In 1985, the Delaware Supreme Court made the first, and leading, decision in *Moran*, which upheld a flip-over provision of a

⁷³ *Id.* at 954.

⁷⁴ Saulsbury, *supra* note 20, at 136.

⁷⁵ Williams Cos. S’holder Litig., No. 2020-0707, 2021 WL 754593, at *1 (Del. Ch. Feb. 26, 2021); *see also* Air Prods. and Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 91–92 (Del. Ch. 2011) (applying *Unocal*’s “enhanced judicial scrutiny” over rational basis).

⁷⁶ Saulsbury, *supra* note 20, at 136.

⁷⁷ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).

⁷⁸ Saulsbury, *supra* note 20, at 136 (citing *Unocal*, 493 A.2d at 955).

⁷⁹ *Unocal*, 493 A.2d at 955 (threats can stem from other shareholders or from third parties).

⁸⁰ *See id.*; *see also* Air Prods. and Chems., Inc., 16 A.3d at 92.

⁸¹ *Unocal*, 493 A.2d at 955 (to satisfy that burden, the board of directors must show “good faith and reasonable investigation”); *Air Prods. and Chems., Inc.*, 16 A.3d at 92 (“i.e., the board must articulate a legally cognizable threat[.]”).

⁸² *Unocal*, 493 A.2d at 955–56; *Moran v. Household Int’l., Inc.*, 500 A.2d 1346, 1356 (Del. 1985); *Air Prods. and Chems., Inc.*, 16 A.3d at 92.

⁸³ A two-step tactic to acquire 100% of a target company’s control: (1) an offeror acquires part of the corporation’s shares—usually in cash, and (2) the offeror acquires the shares remaining for less than cash paid in the first step and commonly in securities valued lower than the cash paid. *Front-End Loaded Tender Offers: The Application of Federal and State Law to an Innovative Corporate Acquisition Technique*, 131 U. PA. L. REV. 389, 389 (1982); Guhan Subramanian, *A New Takeover Defense Mechanism: Using an Equal Treatment Agreement as an Alternative to the Poison Pill*, 23 DEL. J. CORP. L. 375, 386 (1998).

⁸⁴ *See* Williams Cos. S’holder Litig., 2021 WL 754593, at *1; *see also* Ji, *supra* note 11, at 235.

poison pill.⁸⁵ The Court held that a poison pill could be used as an anti-takeover device in an effort to combat a hostile takeover bid.⁸⁶ The Court reasoned that a board of directors' response to an unsolicited takeover attempt "must be judged by the board of directors' actions at that time."⁸⁷ Thus, in a situation in which a poison pill defense is implemented, Delaware courts apply the *Unocal* standard just like other defense strategies.⁸⁸

Now that the background and evolution of poison pills have been discussed, Section III explains the requirements necessary to adopt and use the anti-takeover defense.

III. KEY FEATURES

Although there are variety of different poison pills, each has certain key features: (1) a triggering event, and (2) approval by a target corporation's board of directors.⁸⁹ There are various takeover tactics a hostile acquiror could use, which would trigger the pill—e.g., a front-end loaded, two-tiered tender offer.⁹⁰

A. Occurrence of a Triggering Event

A poison pill provides all shareholders, excluding the acquiror, an opportunity to purchase additional significantly discounted securities if a hostile bid for the corporation occurs.⁹¹ Exercising the purchase rights results in the dilution of the acquiror's interest and increase of the price of the acquisition.⁹²

Typically under a poison pill, each outstanding share of a corporation's common stock will be issued a dividend of one stock purchase right by the board of directors.⁹³ Upon a triggering event, those

⁸⁵ Ji, *supra* note 11, at 235.

⁸⁶ *Moran*, 500 A.2d at 1355.

⁸⁷ *Id.* at 1357.

⁸⁸ *Air Prods. and Chems., Inc.*, 16 A.3d at 127 n.506 ("Moran and virtually every pill case since . . . consistently applied the *Unocal* analysis to defensive measures taken in response to hostile bids.").

⁸⁹ Ji, *supra* note 11, at 229.

⁹⁰ Ji, *supra* note 11, at 229; see also Shawn C. Lese, Note, *Preventing Control from the Grave: A Proposal for Judicial Treatment of Dead Hand Provisions in Poison Pills*, 96 COLUM. L. REV. 2175, 2186 (1996).

⁹¹ Velasco, *Just Do It*, *supra* note 12, at 856.

⁹² Velasco, *Just Do It*, *supra* note 12, at 856.

⁹³ Velasco, *Just Do It*, *supra* note 12, at 857 (explaining that this is a conditional right which is not instantly exercisable and is attached to the share of common stock).

rights become important to the shareholders.⁹⁴ Triggering events occur after the acquisition of a corporation's shares of common stock exceeding a specified percentage without board approval.⁹⁵ That threshold is often between 10% and 20%.⁹⁶ Once it is exceeded, other shareholders are given an opportunity to purchase additional discounted securities,⁹⁷ significantly diluting the hostile bidder's interest within a corporation.⁹⁸

However, what makes the poison pill so "venomous" is that any rights possessed by the hostile bidder then become "void and nontransferable."⁹⁹ The goal is to deter unwanted and unwelcomed hostile acquisitions¹⁰⁰ by making the acquisition extremely expensive and encouraging negotiations with the target corporation's board of directors.¹⁰¹ It is important to note, however, that the dilution depends on the specific terms incorporated into the poison pill.¹⁰²

1. The Front-End Loaded, Two-Tiered Tender Offer

The front-end loaded, two-tiered tender offer by a hostile bidder is one of the most controversial techniques among takeover strategies that disadvantage a target corporation's shareholders,¹⁰³ and involves two steps. First, the hostile bidder offers to purchase a portion of the target corporation's shares, typically a majority of the shares.¹⁰⁴ Second, a freeze-out merger allows the bidder to likely gain "complete ownership,"

⁹⁴ Velasco, *Just Do It*, *supra* note 12, at 857; ARTHUR FLEISCHER, JR. ET AL., TAKEOVER DEFENSE: MERGERS AND ACQUISITIONS § 5.01[B][1] (9th ed. 2022) ("The right has no economic value unless and until an acquiror acquires a specified percentage (typically 10%, 15%, or 20%) of the target's voting stock without board approval.").

⁹⁵ Velasco, *Just Do It*, *supra* note 12, at 857; *see also* Braendal, *supra* note 16, at 655 (often 15%).

⁹⁶ LIPTON & STEINBERGER, *supra* note 21, § 6.03[2][a], at 10; *see also* FLEISCHER ET AL., *supra* note 94, § 5.01[B].

⁹⁷ Velasco, *Just Do It*, *supra* note 12, at 857; LIPTON & STEINBERGER, *supra* note 21, § 6.03[2][a], at 10 (explaining that "the target board may exchange, in whole or in part, right held by holders other than the acquiror for one share of the target's common stock.").

⁹⁸ Velasco, *Just Do It*, *supra* note 12, at 857.

⁹⁹ Velasco, *Just Do It*, *supra* note 12, at 857.

¹⁰⁰ Velasco, *Just Do It*, *supra* note 12, at 858 ("The intention is to deter any unwelcome acquisition, and the poison pill has been very successful in that respect." (citations omitted)).

¹⁰¹ LIPTON & STEINBERGER, *supra* note 21, § 6.03[2][a], at 10.

¹⁰² Velasco, *Just Do It*, *supra* note 12, at 858 (whether the poison pill includes flip-over provisions, back-end provisions, flip-in provisions, or the like).

¹⁰³ Lese, *supra* note 90, at 2184.

¹⁰⁴ Lese, *supra* note 90, at 2184 (allowing the bidder to gain control); *see also* Ji, *supra* note 11, at 229 (explaining that "the raider offers to buy only a portion of a target company's stock[.]").

acquiring any equity that is left of the corporation.¹⁰⁵ The merger then forces the remaining shareholders of the company to swap in their shares for a lower price than that originally offered or low-grade securities.¹⁰⁶

This type of takeover presents difficulty to shareholders: “A shareholder who would prefer that the target remain independent will usually tender anyway out of fear that a majority of her fellow shareholders will tender, leaving her squeezed out of her investment at the lower second-tier price.”¹⁰⁷ Thus, even if shareholders consider an offer price inadequate, they will be forced to tender their shares to the hostile bidder.¹⁰⁸ The front-end loaded, two-tiered tender offer poses a threat to the interests held by a corporation’s shareholders.¹⁰⁹

B. Adoption by the Board of Directors

To use a poison pill, a corporation’s board of directors must adopt the defense, which can be done before or after a threat or hostile bid.¹¹⁰ A board typically implements the defense tactic alone and without any shareholder agreement or vote,¹¹¹ unless authorization for preferred or common stock is required to implement the pill.¹¹² However, a board may still look to shareholder votes to guide the adoption, amendment, or redemption of the poison pill.¹¹³

1. The Board of Directors’ Right to Redeem

A poison pill will attach conditional rights to a corporation’s shares of common stock, which become exercisable in the occurrence of a triggering event—often when 15% to 20% of target’s outstanding shares are acquired.¹¹⁴ However, before the rights become exercisable, a board of

¹⁰⁵ Lese, *supra* note 90, at 2184; Ji, *supra* note 11, at 229 (providing that “later, a merger follows in which the remaining shareholders of the target company receive a lower price than that offered initially.”).

¹⁰⁶ Lese, *supra* note 90, at 2185.

¹⁰⁷ Lese, *supra* note 90, at 2185 (quoting Martin Lipton, *Corporate Governance in the Age of the Finance Corporation*, 136 U. PA. L. REV. 1, 19 (1987)).

¹⁰⁸ Lese, *supra* note 90, at 2185; Ji, *supra* note 11, at 229.

¹⁰⁹ Lese, *supra* note 90, at 2185.

¹¹⁰ Ji, *supra* note 11, at 230; LIPTON & STEINBERGER, *supra* note 21, § 6.03[2][a], at 10 (citing DEL. CODE ANN. tit. 8, §§ 151(g), 157 (1983)).

¹¹¹ Ji, *supra* note 11, at 230.

¹¹² Suzanne S. Dawson et al., *Poison Pill Defensive Measures*, 42 BUS. LAW. 423, 431 (1987).

¹¹³ Ji, *supra* note 11, at 230.

¹¹⁴ Joseph M. Grieco, Note, *The Ever-Evolving Poison Pill: The Pill in Asset Protection and Closely-Held Corporation Cases*, 36 DEL. J. CORP. L. 625, 628 (2011).

directors has the authority to waive the rights given to the shareholders,¹¹⁵ i.e., buying the rights back at a nominal price.¹¹⁶ Because it would be a concern for a board to have an unlimited ability to redeem the rights provided to its shareholders, poison pills typically incorporate a provision providing that the board may redeem the rights prior to a triggering event but not after.¹¹⁷ The option to redeem the rights provides the board with flexibility in a situation in which a tender offer is presented to the corporation.¹¹⁸ Before taking next steps with a tender offer:

Interested acquirors will negotiate with the board to have the poison pill redeemed. With this bargaining leverage, the board of directors may now negotiate on behalf of shareholders in response to both a tender offer and a merger proposal. A bidder cannot circumvent the board by making a tender offer directly to shareholders, because the poison pill will make the transaction too expensive. A necessary first step to any transaction will be board redemption of the poison pill.¹¹⁹

A board of directors also has the ability not to redeem the rights. Moreover, a board of directors is not forced to redeem the conditional rights merely because a noncoercive, all cash tender offer has been received.¹²⁰ In *Moran*, the Delaware Supreme Court affirmed the decision by the Delaware Court of Chancery and stated that: “The board does not now have unfettered discretion in refusing to redeem the [r]ights. The [b]oard has no more discretion in refusing to redeem the [r]ights than it does in enacting any defensive mechanism.”¹²¹

After discussing the key features of a poison pill defense, Section IV details the different types of provisions that may be used, since the defense is not a one-size-fits-all.

¹¹⁵ Dale Arthur Oesterle, *Delaware’s Takeover Statute of Chills, Pills, Standstills, and Who Gets Iced*, 13 DEL. J. CORP. L. 879, 919 (1988).

¹¹⁶ McTear, *supra* note 60, at 885; AARON D. RACHELSON ET AL., CORP. ACQUISITIONS, MERGERS AND DIVESTITURES § 10:103 (2022) (“Until the triggering event occurs, the board retains the power to redeem the rights at a nominal value of a few cents per right.”).

¹¹⁷ Velasco, *Just Do It*, *supra* note 12, at 858 (“Shareholder Rights Plans also include provisions that allow the board of directors to ‘pull the pill’ by redeeming the [r]ights at a nominal price.”).

¹¹⁸ Grieco, *supra* note 114, at 628.

¹¹⁹ RACHELSON ET AL., *supra* note 116, § 10:103.

¹²⁰ Ronald A. Brown, Jr., Note, *An Examination of a Board of Directors’ Duty to Redeem the Rights Issued Pursuant to a Stockholder Rights Plan*, 14 DEL. J. CORP. L. 537, 545 (1989).

¹²¹ *Moran v. Household Int’l, Inc.*, 500 A.2d 1346, 1354 (Del. 1985); Brown, *supra* note 120, at 545 (“These statements by the Delaware Court of Chancery and the Delaware Supreme Court make the issue of the duty to redeem seem clear cut: A board’s decision to redeem will be analyzed just as the enactment of any other defensive measure will be analyzed. This involved the application of the business judgment rule.”).

2. The Fundamental Rights of Shareholders

A shareholder holds various rights regarding its corporation: the right to vote, the right to sell, and the right to elect.¹²² Additionally, under state corporate law certain fundamental matters—e.g., mergers and charter amendments—must be approved by the shareholders and directors are elected by shareholder vote.¹²³ However, not all the rights hold equal value.¹²⁴ Courts have put the importance on a shareholder's right to vote, while shareholders hold their right to sell as the most valued.¹²⁵

Under corporate law, shareholders are given the right to vote during the election for the board of directors and on certain fundamental transactions.¹²⁶ The DGCL is led by the principle that, as an owner of the corporation, a shareholder should make decisions regarding investments and reallocation of corporate powers.¹²⁷ When a board adopts measures, which are calculated to alter corporate structure, the decision making power is taken from the shareholders and given to the board; thus, it “violate[s] at the very least the spirit of the corporate constitution.”¹²⁸

Under state corporate law, there must be a shareholder plurality vote to elect directors.¹²⁹ The plurality vote can only be changed by charter amendment, which requires board and shareholder approval, pursuant to the Model Business Corporation Act.¹³⁰ The default rule, under Delaware law, can be changed through a bylaw amendment, which does not require the board's consent.¹³¹

Shareholder rights are limited when it comes to voting on fundamental transactions.¹³² But it is important to note that shareholders can only vote when the board of directors submits a matter to them.¹³³ And

¹²² Julian Velasco, *Taking Shareholder Rights Seriously*, 41 U.C. DAVIS L. REV. 605, 609 (2007) [hereinafter Velasco, *Seriously*] (citing DEL. CODE ANN. tit. 8, § 251(b), (c) (2020)).

¹²³ *Id.*

¹²⁴ Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 409 (2006) [hereinafter Velasco, *Fundamental*].

¹²⁵ Velasco, *Seriously*, *supra* note 122, at 610.

¹²⁶ Velasco, *Seriously*, *supra* note 122, at 610.

¹²⁷ Jonathan Shub, Comment, *Share Holder Rights Plans—Do They Render Shareholders Defenseless Against Their Own Management?*, 12 DEL. J. CORP. L. 991, 1032–33 (1987).

¹²⁸ *Id.* at 1033; *but see* McTear, *supra* note 60, at 886–87 (“Conversely, a major criticism of poison pills is that they entrench incumbent management, wresting control of the corporation away from shareholders.”).

¹²⁹ Velasco, *Seriously*, *supra* note 122, at 611.

¹³⁰ Velasco, *Seriously*, *supra* note 122, at 612.

¹³¹ Velasco, *Seriously*, *supra* note 122, at 612.

¹³² Velasco, *Seriously*, *supra* note 122, at 612.

¹³³ Velasco, *Fundamental*, *supra* note 124, at 419.

a board of directors will often find alternatives to avoid getting shareholder approval.¹³⁴ The substantial right to amend the corporation's bylaws, which is done without the board's approval, is also limited.¹³⁵ The bylaw must be consistent with the law and/or the charter.¹³⁶

Furthermore, shareholders have the right to sell their shares, a right that is generally very broad.¹³⁷ The Delaware Supreme Court held in *Unocal* that a board of directors has "a great deal of freedom" with how it responds to a hostile bid.¹³⁸ In effect, a target board often has the ability to prevent its shareholders from selling to the hostile bidder.¹³⁹ However, that is a fundamental right and the right that shareholders value most.¹⁴⁰ As such, the ownership rights of the shareholders should be respected, and they should be able to freely sell their shares without the interference of the board.

Studies have shown that a board's adoption of a poison pill tends to negatively impact the wealth of the shareholders.¹⁴¹ And poison pills give boards of directors too much control.¹⁴²

IV. THE DIFFERENT VARIATIONS OF POISON PILLS

As mentioned, the goal of a poison pill is to dilute a hostile acquiror's interest in a corporation deterring unwanted takeover bids.¹⁴³ However, the dilution's impact depends on the terms used in the poison pill.¹⁴⁴ The "flip-over" provision was featured in the original form of the poison pill, but after it showed flaws, other variations began to evolve.¹⁴⁵ The implementation of those provisions alone would simply prevent *any* acquisition of the corporation, regardless of any benefits it could have.¹⁴⁶ Because that limitation essentially bans all acquisitions, pills also

¹³⁴ Velasco, *Fundamental*, *supra* note 124, at 419; *see* Velasco, *Seriously*, *supra* note 122, at 612.

¹³⁵ Velasco, *Seriously*, *supra* note 122, at 613; *see* DEL. CODE ANN. tit. 8, § 109(a) (2020).

¹³⁶ Velasco, *Seriously*, *supra* note 122, at 613.

¹³⁷ Velasco, *Seriously*, *supra* note 122, at 616.

¹³⁸ Velasco, *Seriously*, *supra* note 122, at 617.

¹³⁹ Velasco, *Seriously*, *supra* note 122, at 617.

¹⁴⁰ Velasco, *Seriously*, *supra* note 122, at 610.

¹⁴¹ Subramanian, *supra* note 83, at 401.

¹⁴² Wilton Robinson, *Poison Pills: Recent Negative Economic Effects Justify Repealing the Related Legislation and Increasing Shareholder Ownership Rights*, 9 J. BUS. ENTREPRENEURSHIP & L. 1, 12 (2016).

¹⁴³ Velasco, *Just Do It*, *supra* note 12, at 858.

¹⁴⁴ Velasco, *Just Do It*, *supra* note 12, at 858.

¹⁴⁵ Velasco, *Just Do It*, *supra* note 12, at 858.

¹⁴⁶ Velasco, *Just Do It*, *supra* note 12, at 858.

incorporate provisions enabling a board to redeem stock purchase rights at a nominal price; thus, encouraging negotiations with the target board.¹⁴⁷ After negotiations, the board may vote to pull the pill by redeeming the rights if the acquiror successfully persuades them. But, if the acquiror is unsuccessful, the poison pill remains.¹⁴⁸

There have been five basic provisions which have developed since the poison pill's introduction in 1983: flip-over, flip-in, back-end, exchange option, and dead-hand/no-hand.¹⁴⁹

A. *The Flip-Over Provision*

In the occurrence of a triggering event, the flip-over plan requires a target corporation "to honor the redemption or conversion provisions of its poison pill."¹⁵⁰ However, due to its flaws, the flip-over provision is no longer favored on its own.¹⁵¹

Originally, flip-over provisions were featured in poison pills.¹⁵² The provisions were commonly based upon the plan adopted by Household International, Inc.'s¹⁵³ board of directors in 1984.¹⁵⁴ The flip-over provision is:

A provision by which a target company grants its shareholders rights to purchase common or preferred shares of the acquiring company at a deep discount if a large block of stock of the target is purchased in a transaction that is not approved by the board of directors. The provision is intended to discourage *two-tiered tender offers* by causing the merger of the firm to be prohibitively expensive.¹⁵⁵

In a flip-over pill, a corporation's common shares each carry the right to purchase another preferred or common shares at a fixed price.¹⁵⁶

¹⁴⁷ Velasco, *Just Do It*, *supra* note 12, at 858–59.

¹⁴⁸ Velasco, *Just Do It*, *supra* note 12, at 859.

¹⁴⁹ Dawson et al., *supra* note at 112, at 424.

¹⁵⁰ CORP. ANTI-TAKEOVER DEFENSES: THE POISON PILL § 1:1 (2022).

¹⁵¹ Velasco, *Just Do It*, *supra* note 12, at 858.

¹⁵² Velasco, *Just Do It*, *supra* note 12, at 858, 860.

¹⁵³ See generally *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985).

¹⁵⁴ Dawson et al., *supra* note at 112, at 426.

¹⁵⁵ ROBERT F. BRUNER, THE POISON PILL ANTI-TAKEOVER DEFENSE: THE PRICE OF STRATEGIC DETERRENCE 73 (1991) (emphasis in original).

¹⁵⁶ RACHELSON ET AL., *supra* note 116, § 10:103.

The rights are redeemable at any time prior to a triggering event¹⁵⁷ by the board “for a nominal price, trade with the underlying common stock, and cannot be exercised.”¹⁵⁸ Upon a triggering event, the rights distribute to the common shareholders and become freely transferable, though they remain useless.¹⁵⁹ The right remains powerless until the acquiror attempts a squeeze-out merger or the like, making the rights exercisable.¹⁶⁰

The rights will “flip over” upon a triggering event enabling the rights holders to purchase shares of the acquiror at a fixed price below market value—often half.¹⁶¹ The acquiror’s shares of common stock the holders receive have a market value double the exercise price.¹⁶² Moreover, if the acquiror gains control and merges with the target, the holders are entitled to purchase the merged entity’s shares at the exercise price.¹⁶³

In effect, the acquiror’s interest becomes diluted and the transaction’s cost increases to a prohibitive level,¹⁶⁴ additionally preventing destruction and ensuring the continuation of dilution.¹⁶⁵ Flip-over provisions obstruct a hostile bidder’s acquisition of the target by a leveraged buy-out.¹⁶⁶

Notably, one of the most “venomous effect[s]” is the threat to “the status of a controlling shareholder of the acquiror.”¹⁶⁷ Specifically, the interest of the acquiror in the target company does not dilute; however, “the interest of the acquiror’s shareholders in the acquiror” will dilute.¹⁶⁸ The dilution to an acquiror’s status occurs because it requires the acquiror:

To issue a large number of additional shares to the shareholders of the target company, and even a 100% owner could easily find itself becoming a minority shareholder. A controlling shareholder might be

¹⁵⁷ E.g., acquisition of a specified amount of stock or a tender offer for a specified percentage of the issuer’s stock. Dawson et al., *supra* note 112, at 426; *see also* RACHELSON ET AL., *supra* note 116, § 10:103.

¹⁵⁸ Dawson et al., *supra* note 112, at 426–27.

¹⁵⁹ Velasco, *Just Do It*, *supra* note 12, at 860; Dawson et al., *supra* note at 112, at 427.

¹⁶⁰ Velasco, *Just Do It*, *supra* note 12, at 860.

¹⁶¹ RACHELSON ET AL., *supra* note 116, § 10:103; Block et al., *supra* note 23, at 638.

¹⁶² Velasco, *Just Do It*, *supra* note 12, at 860.

¹⁶³ RACHELSON ET AL., *supra* note 116, § 10:103; Block et al., *supra* note 23, at 638.

¹⁶⁴ RACHELSON ET AL., *supra* note 116, § 10:103; *see* 4 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPS. § 23:7 (3d ed. 2022).

¹⁶⁵ William J Carney & Leonard A. Silverstein, *The Illusory Protections of the Poison Pill*, 79 NOTRE DAME L. REV. 179, 182 n.9 (2003).

¹⁶⁶ Velasco, *Just Do It*, *supra* note 12, at 860.

¹⁶⁷ Velasco, *Just Do It*, *supra* note 12, at 860–61.

¹⁶⁸ Velasco, *Just Do It*, *supra* note 12, at 861.

unwilling to lose or threaten her status as such, and this might cause the acquiror to forego the acquisition.¹⁶⁹

The shortcoming of a flip-over provision is that it can only be effective if the acquiror insists on a merger or a substantial sale of assets to follow the acquisition.¹⁷⁰ Conversely, no protections are provided if the acquiror is content maintaining control over the corporation as “a partially-owned subsidiary.”¹⁷¹ Thus, the flip-over plan proved itself to be a failure when it came to deterring unsolicited takeovers.¹⁷²

B. *The Flip-In Provision*

The most common poison pills incorporate a flip-over provision and a flip-in provision.¹⁷³ The flip-in plan is the most substantial and most common feature of the modern poison pill.¹⁷⁴ The flip-in provision is:

A provision by which a target company grants its shareholders rights to purchase additional common or preferred shares of the target at a deep discount if a large block of the target is purchased in a transaction that is not approved by the board of directors. The provision is triggered automatically by an acquir[o]r crossing a specified ownership threshold, and it operates by the issuance of substantial amounts of new target common stock at a deeply discounted price to all target shareholders but the acquir[o]r. The acquirer’s holdings suffer a substantial dilution in value.¹⁷⁵

Flip-in pills allow a target corporation’s common stockholders to buy stock and/or debt of the company at a reduced price.¹⁷⁶ The right is

¹⁶⁹ Velasco, *Just Do It*, *supra* note 12, at 861.

¹⁷⁰ Velasco, *Just Do It*, *supra* note 12, at 861; *see* RACHELSON ET AL., *supra* note 116, § 10:103 (“A flip-over right, however, will not deter an acquiror who does not require a merger to finance his offer.”).

¹⁷¹ Velasco, *Just Do It*, *supra* note 12, at 861.

¹⁷² Velasco, *Just Do It*, *supra* note 12, at 861.

¹⁷³ Ji, *supra* note 11, at 231.

¹⁷⁴ Velasco, *Just Do It*, *supra* note 12, at 864; RACHELSON ET AL., *supra* note 116, § 10:103.

¹⁷⁵ BRUNER, *supra* note 155, at 73.

¹⁷⁶ Dawson et al., *supra* note at 112, at 424, 428 (explaining that the right to purchase the stock may come prior to a business combination but may happen regardless); *see also* Ji, *supra* note 11, at 231 (the discounted price is often 50% of market value).

activated once a triggering event has occurred,¹⁷⁷ at which point those rights become nonredeemable, leaving the rights of the acquiror “null and void.”¹⁷⁸

As mentioned, a conditional right is provided to shareholders to purchase additional shares of the target company’s common stock or preferred stock at a discounted price.¹⁷⁹ Like a flip-over provision, the rights become transferable upon a triggering event.¹⁸⁰ However, unlike the flip-over provision, the right is immediately exercisable.¹⁸¹

Once activated, the conditional rights of all other shareholders vest,¹⁸² and shareholders receive the opportunity to acquire the target company’s stock at half-price.¹⁸³ The target’s common stock shares received by rights holders have a market value double the exercise price.¹⁸⁴ The purpose of the flip-in plan is to:

Inflict an immediate economic loss on anyone who triggers it by purchasing or otherwise acquiring a specified percentage of target stock. These additional shares dilute the bidder’s voting interest in the target and raise the overall cost to an uneconomical level. The bidder must purchase shares from the shareholders often at over twice the price at which the target has sold them.¹⁸⁵

Nevertheless, the effect of a flip-in pill will cause dilution to an acquiror’s investment and voting powers associated with the target corporation.¹⁸⁶ The flip-in provision has successfully deterred hostile bids and its effects have been significantly detrimental to an acquiror’s interest.¹⁸⁷

¹⁷⁷ Ji, *supra* note 11, at 231 (triggered when the hostile bidder exceeds the ownership threshold of the target corporation’s outstanding stocks); *see also* Dawson et al., *supra* note at 112, at 428.

¹⁷⁸ RACHELSON ET AL., *supra* note 116, § 10:103.

¹⁷⁹ Velasco, *Just Do It*, *supra* note 12, at 864.

¹⁸⁰ Velasco, *Just Do It*, *supra* note 12, at 864.

¹⁸¹ Velasco, *Just Do It*, *supra* note 12, at 864.

¹⁸² Ji, *supra* note 11, at 231.

¹⁸³ Velasco, *Just Do It*, *supra* note 12, at 864; Ji, *supra* note 11, at 231; *see* RACHELSON ET AL., *supra* note 116, § 10:103 (up to 75% below market).

¹⁸⁴ Velasco, *Just Do It*, *supra* note 12, at 864.

¹⁸⁵ RACHELSON ET AL., *supra* note 116, § 10:103.

¹⁸⁶ Dawson et al., *supra* note at 112, at 428.

¹⁸⁷ Velasco, *Just Do It*, *supra* note 12, at 864.

C. *The Back-End Provision*

A back-end provision is a less common feature of a poison pill.¹⁸⁸ The provision determines a “minimum takeover price,”¹⁸⁹ and is very effective.¹⁹⁰ When implemented:

The back-end provision plan grants shareholders the right to redeem their shares for cash or debt securities either at a price determined by formula or at the highest price at which the hostile bidder acquired its shares once a hostile bidder obtains a triggering percentage of the corporation’s outstanding stock. The redemption price generally is significantly higher than the current market value of the stock.¹⁹¹

Typically, a back-end provision includes a corporation’s issuance of rights to common stockholders allowing them to tender their common stock for a package of securities worth more than the common stock’s market value upon the occurrence of specified triggering event.¹⁹² Once triggered, the rights become nonredeemable and exercisable by each common stockholder besides the acquiror.¹⁹³

A back-end plan makes it almost unattainable for the hostile bidder to purchase the target company at a price “less than the stipulated price per share set by management.”¹⁹⁴ Thus, back-end provisions are successful in stopping a hostile takeover attempt and protect shareholders from two-tiered tender offers.¹⁹⁵

There are various forms of a back-end plan which include a put pill and a value assurance pill.¹⁹⁶

1. The Put Pill

The put pill provides a stockholder the right to compel an issuer to give debt securities or cash amounting to “the ‘fair value’ of the

¹⁸⁸ Velasco, *Just Do It*, *supra* note 12, at 862.

¹⁸⁹ Block et al., *supra* note 23, at 639.

¹⁹⁰ RACHELSON ET AL., *supra* note 116, § 10:103.

¹⁹¹ Block et al., *supra* note 23, at 639.

¹⁹² Dawson et al., *supra* note at 112, at 428; RACHELSON ET AL., *supra* note 116, § 10:103.

¹⁹³ Dawson et al., *supra* note at 112, at 428.

¹⁹⁴ RACHELSON ET AL., *supra* note 116, § 10:103.

¹⁹⁵ RACHELSON ET AL., *supra* note 116, § 10:103.

¹⁹⁶ Velasco, *Just Do It*, *supra* note 12, at 862.

company's common stock" in exchange for the holder's stock.¹⁹⁷ However, a shareholder only receives this right if a hostile bidder acquires a majority of the target company's shares.¹⁹⁸

2. The Value Assurance Pill

Upon a triggering event, the value assurance pill provides shareholders a right to receive cash or debt securities amounting to "the excess of the 'fair value' of the company's stock . . . over the tender offer price paid by the acquiror."¹⁹⁹ The target corporation's board of directors determines the amount equaling the excess of the fair value of stock.²⁰⁰ There is variation in the nature of the right to receive assets from a target corporation with a back-end provision, however:

The effect would be essentially the same for all such plans: assets would be drained from the company and distributed to shareholders other than the acquiror. While the back-end pill would not dilute the voting interest of the hostile bidder, the economic effect potentially would be more severe than under the flip-in or flip-over pills.²⁰¹

A significant downfall of the back-end provision is the need to determine the fair value of the target corporation's stock.²⁰² However, if a corporation is threatened by a takeover, the board of directors may not want to determine the fair price for the stock.²⁰³ Thus, the fair value determination limits the back-end provision's popularity.²⁰⁴

D. *The Exchange Option*

The flip-over and flip-in provisions have a significant shortcoming:²⁰⁵ shareholders holding the rights are compelled to pay the

¹⁹⁷ Velasco, *Just Do It*, *supra* note 12, at 862.

¹⁹⁸ Block et al., *supra* note 23, at 639 (explaining the right of the shareholders to sell their shares back to the company "if a bidder buys a majority, but not all, of the target's shares.").

¹⁹⁹ Velasco, *Just Do It*, *supra* note 12, at 862.

²⁰⁰ Velasco, *Just Do It*, *supra* note 12, at 862.

²⁰¹ Velasco, *Just Do It*, *supra* note 12, at 862 (noting it theoretically drains all the target company's value which dilutes the acquiror's interest to zero).

²⁰² Velasco, *Just Do It*, *supra* note 12, at 863 (providing that "fair value is a dynamic concept and must be determined based on the circumstances at a given time.").

²⁰³ Velasco, *Just Do It*, *supra* note 12, at 863.

²⁰⁴ Velasco, *Just Do It*, *supra* note 12, at 863.

²⁰⁵ Velasco, *Just Do It*, *supra* note 12, at 865.

exercise price.²⁰⁶ There is concern over the requirement for right holders to pay the exercise price:

Because the exercise price generally is set at the long-term value of the stock and far in excess of the current market value, the poison pill would require the Right holders to put up significantly more money than their initial investments in order to take advantage of the poison pill. While this might not be unmanageable for the institutional investor, it might be problematic for the individual investor.²⁰⁷

A poison pill may, as a preventative measure, give a target corporation the option to exchange “the [r]ights for securities or cash at a lower level.”²⁰⁸ Upon the occurrence of a flip-in event, exchange provisions enable a board of directors of the target company to “call” any outstanding rights and exchange each for one share of the corporation’s common stock.²⁰⁹ The dilution of the exchange provision is similar to the dilution from a flip-in pill, but it does not require the purchase at the exercise price.²¹⁰

The addition of an exchange option could have a more dramatic effect by exchanging more than one of the target’s common stock shares for the rights.²¹¹ The exchange option eludes costs associated with the requirement that right holders must exercise their flip-in rights, removes the doubt surrounding whether rights holders will exercise their rights, dilutes interest, and gives a board of directors more “flexibility in responding to a triggering event.”²¹²

Nevertheless, the exchange option²¹³ provides a target company an option to exchange “some or all of the [r]ights for the exercise price in cash.”²¹⁴ The exchange essentially carries the same effect as a back-end

²⁰⁶ Velasco, *Just Do It*, *supra* note 12, at 865.

²⁰⁷ Velasco, *Just Do It*, *supra* note 12, at 865–66 (internal citations omitted).

²⁰⁸ Velasco, *Just Do It*, *supra* note 12, at 866.

²⁰⁹ Ji, *supra* note 11, at 231 n.75 (explaining that the rights of the shareholder who triggered the pill are voided).

²¹⁰ Velasco, *Just Do It*, *supra* note 12, at 866; Ji, *supra* note 11, at 231 n.75 (explaining dilution can occur without the board having to rely on the shareholders “to put up cash to exercise their rights.” (citation omitted)).

²¹¹ Velasco, *Just Do It*, *supra* note 12, at 866 & n.92 (explaining the possibility of exchanging for “as many shares of the company’s common stock as would be equal in value to the exercise price.”).

²¹² LIPTON & STEINBERGER, *supra* note 21, § 6.03[2][a].

²¹³ The exchange option is the most aggressive form of a poison pill. Velasco, *Just Do It*, *supra* note 12, at 867.

²¹⁴ Velasco, *Just Do It*, *supra* note 12, at 867.

provision by reducing ownership interest of the acquiror and distributing assets amongst the rights holders.²¹⁵ The effect, therefore, results in severe damage to the acquiror's interest in the company.²¹⁶ The purpose being that the board may dilute an acquiror's interest without any reliance on stockholders in which they must "put up cash to exercise their rights."²¹⁷

E. *The Dead Hand Provision*

As more companies began to implement poison pills, takeover strategies also evolved.²¹⁸ One tactic involved a combination of "a tender offer with a consent solicitation or proxy contest to unseat the incumbent board."²¹⁹ The dead hand provision, invalidated by the Delaware Court of Chancery in *Carmody v. Toll Brothers, Inc.*,²²⁰ was added to expand and strengthen the capabilities of a target corporation's poison pill in response to the combined takeover strategy.²²¹ The provision was named after its distinguishing feature—the continuing director²²² provision.²²³ It provides that a poison pill may only be redeemed by the "continuing directors."²²⁴ As a result, a dead hand plan cannot be redeemed by anyone else during the pill's lifetime,²²⁵ and creates two classes of directors with separate voting powers.²²⁶

Thus, a dead hand poison pill blocks a new board of directors from redeeming the rights which stand in the way of the acquisition.²²⁷ The dead hand pill can only be redeemed by incumbent directors or their approved successors.²²⁸ Without the power to redeem, a hostile bidder cannot use a proxy contest to defeat the poison pill and therefore the sale of the target company is precluded.²²⁹

²¹⁵ Velasco, *Just Do It*, *supra* note 12, at 867 (noting that distribution likely could not reach 100% of the value of the target corporation).

²¹⁶ Velasco, *Just Do It*, *supra* note 12, at 867.

²¹⁷ Ji, *supra* note 11, at 231 n.75 (citation omitted).

²¹⁸ See Ji, *supra* note 11, at 233.

²¹⁹ Ji, *supra* note 11, at 233 (citation omitted).

²²⁰ 723 A.2d 1180, 1184 (Del. Ch. 1998).

²²¹ Ji, *supra* note 11, at 233 (citing Lese, *supra* note 90, at 2187); Grieco, *supra* note 114, at 631.

²²² Continuing directors are directors who were in office when the poison pill was adopted, or the directors' approved successors. Ji, *supra* note 11, at 225.

²²³ COX & HAZEN, *supra* note 164, § 23:7.

²²⁴ Ji, *supra* note 11, at 225.

²²⁵ Ji, *supra* note 11, at 233 (citation omitted); see also COX & HAZEN, *supra* note 164, § 23:7.

²²⁶ Grieco, *supra* note 114, at 632; McTear, *supra* note 60, at 913.

²²⁷ COX & HAZEN, *supra* note 164, § 23:7.

²²⁸ Ji, *supra* note 11, at 233.

²²⁹ Grieco, *supra* note 114, at 632; Ji, *supra* note 11, at 233.

There are modified and milder forms of the dead hand provision.²³⁰ An example of a less extreme form may provide that the power to redeem the poison pill may only be held by directors elected by a supermajority shareholder vote.²³¹

1. The No Hand Variation

Another milder version of a dead hand provision is of limited duration, also known as the “no hand” or “delayed redemption” provision.²³² A no hand plan prohibits redemption of the poison pill by all directors for a limited period of time,²³³ and will enable:

A board newly elected through a proxy contest waged by a hostile bidder to redeem the pill, but only after a waiting period During the waiting period, none of the directors (whether continuing or newly elected) has the power to redeem the pill The no hand pill appears milder when compared with the pure dead hand pill, whose “waiting period” can be up to ten years.²³⁴

However, in 1998 the Delaware Supreme Court held the no hand provision to be invalid under Delaware law.²³⁵

2. Surrounding Controversy

Several courts, including those in Delaware,²³⁶ have invalidated dead hand provisions.²³⁷ However, states like Pennsylvania and Georgia have upheld their validity.²³⁸ Originally, in *Carmody*, the Delaware Court

²³⁰ Ji, *supra* note 11, at 233.

²³¹ Ji, *supra* note 11, at 234; *see, e.g.*, *Bank of New York Co. v. Irving Bank Corp.*, 528 N.Y.S.2d 482 (Sup. Ct. 1988).

²³² Ji, *supra* note 11, at 234.

²³³ Ji, *supra* note 11, at 225; *see* McTear, *supra* note 60, at 894 .

²³⁴ Ji, *supra* note 11, at 234 (internal citations omitted).

²³⁵ *See* *Quickturn Design Systems, Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998).

²³⁶ *See generally id.* (holding that the dead hand provision plan impermissibly interfered with (1) the board of directors’ power to direct and manage a company’s business and affairs under DGCL § 141(a), and (2) the board’s fiduciary duty to exercise best judgment during management of the company).

²³⁷ RACHELSON ET AL., *supra* note 116, § 10:104.

²³⁸ Ji, *supra* note 11, at 266; *see also* LIPTON & STEINBERGER, *supra* note 21, § 6.03[2][d].

of Chancery struck down poison pills using dead hand provisions.²³⁹ The Court held that the pill violated various Delaware statutory provisions and created two classes of directors with separate voting powers, which must be established through a certificate of incorporation.²⁴⁰ The Court found that the provision was “coercive and preclusive under the [*Unocal*] test,”²⁴¹ which rendered the dead hand provision an unreasonable response.²⁴² Both the dead hand and no hand provisions to a poison pill “do not survive the enhanced test enunciated in *Unocal*.”²⁴³ After the invalidation of the dead hand provision in *Carmody*, the validity of the no hand provision was questioned.²⁴⁴ Unlike the dead hand provision, the no hand pill excluded all of the newly elected directors from redeeming the rights, which does not create distinct classes of directors.²⁴⁵

In *Mentor Graphics Corp. v. Quickturn Design Systems, Inc.*,²⁴⁶ the Delaware Court of Chancery concluded that under the second prong of the *Unocal* standard, the no hand provision that was used was not a reasonable response.²⁴⁷ The Court held that the no hand provision was invalid “based on the facts” in *Mentor*, and left open its validity in other circumstances.²⁴⁸ Subsequently on appeal,²⁴⁹ the Delaware Supreme Court held that the no hand provision was invalid because it violated Delaware statutory law and the board’s fiduciary duties, similarly to dead hand provisions.²⁵⁰ The Supreme Court’s holding presented a “bright line principle” under Delaware law that any form of a dead hand provision is per se invalid.²⁵¹ The Court reasoned that “[o]ne of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation.”²⁵² The Court held that the no hand provision was “invalid under Section 141(a), which

²³⁹ Grieco, *supra* note 114, at 632; *see Carmody v. Toll Bros., Inc.*, 723 A.2d 1180 (Del. Ch. 1998).

²⁴⁰ *Carmody*, 723 A.2d at 1190–91; Grieco, *supra* note 114, at 632.

²⁴¹ Grieco, *supra* note 114, at 632; *see discussion supra* Section II.B (defining the *Unocal* test).

²⁴² Grieco, *supra* note 114, at 632 (internal citations omitted).

²⁴³ *McTear*, *supra* note 60, at 910.

²⁴⁴ Grieco, *supra* note 114, at 632.

²⁴⁵ Grieco, *supra* note 114, at 632.

²⁴⁶ 728 A.2d 25, 28 (Del. Ch. 1998).

²⁴⁷ Grieco, *supra* note 114, at 633 (citing *Mentor Graphics Corp. v. Quickturn Design Systems, Inc.*, 728 A.2d 25, 50 (Del. Ch. 1998)).

²⁴⁸ Grieco, *supra* note 114, at 633.

²⁴⁹ *See Quickturn Design Systems, Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998).

²⁵⁰ Grieco, *supra* note 114, at 633 (“Both versions of the pill inappropriately restricted the board’s power in contraventions of the certificate of incorporation.”).

²⁵¹ *Ji*, *supra* note 11, at 251 (internal quotation marks omitted).

²⁵² *Quickturn*, 721 A.2d at 1291; *see also RACHELSON ET AL.*, *supra* note 116, § 10:104.

confers upon any newly elected board of directors *full* power to manage and direct the business and affairs of a Delaware corporation.”²⁵³

Section IV reviewed the poison pill and its different provisions. Next, Section V discusses Musk’s recent hostile offer to acquire Twitter and the poison pill which Twitter adopted to thwart Musk’s bid.

V. THE BID TO PURCHASE TWITTER AND THE EFFECTS ON ITS SHAREHOLDERS

Twitter filed its Certification of Incorporation with the Delaware Secretary of State on April 19, 2007.²⁵⁴

It was revealed on April 4, 2022 through a regulatory SEC filing that Musk acquired approximately 9% of Twitter’s stake.²⁵⁵ He became the leading shareholder after purchasing 73.5 billion shares of the corporation.²⁵⁶ The acquisition was valued at \$3 billion.²⁵⁷ On April 13, 2022, Musk stated his unsolicited offer in a letter:

I am offering to buy 100% of Twitter for \$54.20 per share in cash, a 54% premium over the day before I began investing in Twitter and a 38% premium over the day before my investment was publicly announced. My offer is my best and final offer and if it is not accepted, I would need to reconsider my position as a shareholder.²⁵⁸

And on April 14, 2022, an SEC filing showed Musk’s unsolicited offer to purchase Twitter for \$44 billion.²⁵⁹ Specifically, Musk offered to acquire Twitter’s remaining shares at \$54.20 each.²⁶⁰

Next, on April 15, 2022, “[f]aced with Musk’s rapid accumulation of Twitter stock and take-it-or-leave-it offer, and concerned that he might

²⁵³ *Quickturn*, 721 A.2d at 1292 (emphasis in original).

²⁵⁴ *Twitter, Inc. Amended and Restated Certificate of Incorporation*, SEC: EDGAR, Oct. 19, 2013, <https://www.sec.gov/Archives/edgar/data/1418091/000119312513406804/d564001dex32.htm>.

²⁵⁵ *Timeline*, *supra* note 1; see also Margaret K. Ryder et al., *Twitter v. Musk: Will the Court of Chancery Break New Ground in Delaware Corporate Law?*, DEL. J. CORP. L.: BLOG (Aug. 8, 2022), <https://djcl.org/twitter-v-musk-will-the-court-of-chancery-break-new-ground-in-delaware-corporate-law/>.

²⁵⁶ *Timeline*, *supra* note 1.

²⁵⁷ *Timeline*, *supra* note 1.

²⁵⁸ Compl. ¶ 24.

²⁵⁹ *Timeline*, *supra* note 1.

²⁶⁰ Klugy Mathurin, *Twitter Board of Directors Adopts a Poison Pill*, NAT’L LAW R. (Apr. 19, 2022), <https://www.natlawreview.com/article/twitter-board-directors-adopts-poison-pill>.

launch a hostile tender offer without notice,”²⁶¹ Twitter’s board unanimously adopted a poison pill.²⁶² The terms of the plan provided that “a single investor or group’s acquisition of more than 15% of the company’s outstanding common stock without board approval gives other stockholders the opportunity to acquire stock at a considerable discount.”²⁶³ Twitter’s poison pill included a flip-in provision, a flip-over provision, preferred stock purchase rights,²⁶⁴ and would last for a limited duration of one year.²⁶⁵ If Musk exceeded the 15% threshold, then the pill would enable all other shareholders to purchase additional shares at a discounted price, in this case “a Twitter shareholder [would] pay \$210 for securities worth \$420,”²⁶⁶ thus, flooding the market.²⁶⁷ Once the other shareholders acquire extra shares at a considerable discount, dilution occurs to the shares held by Musk, and as a result, Musk is presented with a more costly acquisition.²⁶⁸

The pill provided Twitter’s board of directors with more time to determine how to proceed with the hostile offer,²⁶⁹ which forces Musk to negotiate directly with the board.²⁷⁰ However, once the pill is triggered, shareholders would not be able to sell their shares to Musk.²⁷¹ Nevertheless, the Twitter board of directors maintains control over the acquisition while its shareholders lose a fundamental right to sell.²⁷²

²⁶¹ Compl. ¶ 27.

²⁶² *Id.*; Vanamali, *supra* note 4; *Timeline*, *supra* note 1.

²⁶³ Compl. ¶ 27.

²⁶⁴ Mathurin, *supra* note 260.

²⁶⁵ Vanamali, *supra* note 4.

²⁶⁶ Mathurin, *supra* note 260.

²⁶⁷ Vanamali, *supra* note 4; Mathurin, *supra* note 260.

²⁶⁸ Bobby Allyn, *Twitter Adopts ‘Poison Pill’ to Block Elon Musk Takeover Bid*, NPR: TECHNOLOGY (Apr. 15, 2022, 1:27 PM), <https://www.npr.org/2022/04/15/1093077611/twitter-board-poison-pill-elon-musk>.

²⁶⁹ Enabling the board to take Musk’s offer into consideration and determine whether selling Twitter is logical and, if they sell, whether selling Twitter to Musk is logical. *Id.*

²⁷⁰ Vanamali, *supra* note 4.

²⁷¹ Vanamali, *supra* note 4.

²⁷² A shareholder holds various rights regarding its corporation: the right to vote, to sell, and to elect. Velasco, *Seriously*, *supra* note 122, at 609.

Perhaps seeking to raise the ire of those shareholders, Musk used the social media platform to share that Twitter would be breaching its fiduciary duties if the board acted in conflict with the best interests of the shareholders. Vanamali, *supra* note 4; Elon Musk (@elonmusk), TWITTER (Apr. 14, 2022, 5:34 PM), <https://twitter.com/elonmusk/status/1514718700674306052> (“If the current Twitter board takes actions contrary to shareholder interests, they would be breaching their fiduciary duty. The liability they would thereby assume would be titanic in scale.”).

Musk also used the social media platform to state that “[t]aking Twitter private at \$54.20 should be up to shareholders, not the board” and added a poll for users to vote. Elon Musk (@elonmusk), TWITTER (Apr. 14, 2022, 4:12 PM), <https://twitter.com/elonmusk/>

A poison pill, however, does not prohibit the board of directors from engaging with interested parties about acquiring the company or accepting an offer the board thinks is in the best interests of the corporation and its shareholders.²⁷³ In order for Twitter's board to determine whether the acquisition would be in the best interest of the corporation and its shareholders, Musk had to show how serious his intentions were.²⁷⁴ To prove his seriousness, Musk had to show one of two things: "how exactly he plans on financing the takeover, since Musk did not reveal that in his [SEC] filing, or . . . launch[] a proxy contest to try to replace members of Twitter's board in response to the poison pill plan."²⁷⁵

Musk established his by intentions by providing his plan to finance the deal. To help fund his acquisition, Musk ultimately used Tesla Inc. ("Tesla").²⁷⁶ He planned to fund with "tens of billions of dollars worth of his Tesla shares to support margin loans."²⁷⁷ Additionally, Musk would fund the transaction with \$27.5 billion worth of equity, and \$8.5 billion from the sale of a portion of his Tesla stock.²⁷⁸

Then, on April 25, 2022, after consideration by the board, Twitter and Musk entered into a "seller friendly"²⁷⁹ merger agreement pursuant to the DGCL.²⁸⁰ Twitter negotiated with Musk and, ultimately, reached an agreement in which Musk would acquire Twitter for \$44 billion.²⁸¹ Pursuant to the agreement, Musk would purchase each share of Twitter for \$54.20 in cash.²⁸² The parties agreed that the corporation would continue under the name "Twitter, Inc." and be governed by Delaware State law.²⁸³ Moreover, a clause was included in the agreement requiring a \$1 billion

status/1514698036760530945 (the overwhelming vote on the tweet was in favor of the shareholders—83.5% compared to 16.5%).

²⁷³ Allyn, *supra* note 268.

²⁷⁴ Allyn, *supra* note 268.

²⁷⁵ Allyn, *supra* note 268.

²⁷⁶ Giles Turner & Edwin Chan, *Elon Musk Secures \$7.1 Billion in New Financing for Twitter*, BLOOMBERG: TECHNOLOGY, <https://www.bloomberg.com/news/articles/2022-05-05/elon-musk-secures-7-2-billion-in-new-financing-for-twitter-deal> (last updated May 5, 2022, 10:33 AM); *see also* Ryder et al., *supra* note 255.

²⁷⁷ Turner & Chan, *supra* note 276.

²⁷⁸ Turner & Chan, *supra* note 276.

²⁷⁹ Compl. ¶ 4; *see also* Jef Feeley, *Twitter Hits Back at Musk, Suing to Force \$44 Billion Buyout*, BLOOMBERG: TECHNOLOGY, <https://www.bloomberg.com/news/articles/2022-07-12/twitter-sues-to-force-musk-to-consummate-44-billion-buyout> (last updated July 12, 2022, 7:40 PM).

²⁸⁰ *Agreement and Plan of Merger*, SEC: EDGAR, Apr. 25, 2022, <https://www.sec.gov/Archives/edgar/data/1418091/000119312522120461/d310843dex21.htm> [hereinafter *Merger*].

²⁸¹ Compl. ¶ 3; *Timeline*, *supra* note 1.

²⁸² Compl. ¶ 13.

²⁸³ *Merger*, *supra* note 280.

breakup fee if the agreement was terminated.²⁸⁴ Shockingly, on July 8, 2022, Musk notified Twitter of his decision to terminate the deal.²⁸⁵ The notice alleged three grounds for his termination:

- (i) purported breach of information-sharing and cooperation covenants;
- (ii) supposed “materially inaccurate representations” in the merger agreement that are “reasonably likely to result in” a Company Material Adverse Effect; and
- (iii) purported failure to comply with the ordinary course covenant by terminating certain employees, slowing hiring, and failing to retain key personnel.²⁸⁶

Shareholders have since filed a class action suit against both Twitter and Musk.²⁸⁷ On July 12, 2022, as a result of Musk’s termination, Twitter filed suit against Elon Musk, X Holdings I, Inc., and X Holdings II, Inc.²⁸⁸ Moreover, Twitter then filed a motion to expedite proceedings, and argued that as a result of Musk’s termination of the merger agreement, “expedition is essential to permit Twitter to secure the benefit of its bargain, to address Musk’s continuing breaches, and to protect Twitter and its stockholders from continuing market risk and operation harm.”²⁸⁹ The Court of Chancery granted the expedited timeline.²⁹⁰

On October 28, 2022, after much back and forth, Elon Musk ultimately purchased Twitter at the original agreed upon terms: “\$54.20 a share at a total cost of roughly \$44 billion.”²⁹¹ Subsequently, Musk laid off around half of Twitter’s staff, fired top executives, overhauled Twitter’s subscription service, and formed a “content moderation council.”²⁹²

²⁸⁴ Gerrit De Vynck et al., *Elon Musk Files to Back Out of Twitter Deal*, WASHINGTON POST: TECHNOLOGY (July 8, 2022, 5:25 PM), <https://www.washingtonpost.com/technology/2022/07/08/musk-deal-sec/>.

²⁸⁵ Compl. ¶ 9; Feeley, *supra* note 279; *see also* Ryder et al., *supra* note 255.

²⁸⁶ Compl. ¶ 9.

²⁸⁷ Kolodny, *supra* note 9.

²⁸⁸ Elizabeth Dwoskin & Rachel Lerman, *Twitter sues Elon Musk, Setting Stage for Epic Legal Battle*, WASHINGTON POST: TECHNOLOGY (July 12, 2022, 5:04 PM), <https://www.washingtonpost.com/technology/2022/07/12/twitter-elon-musk-lawsuit/>; *see also* Kif Leswing & Lauren Feiner, *Twitter Sues Elon Musk to Enforce Original Merger Agreement*, CNBC: TECH, <https://www.cnbc.com/2022/07/12/twitter-sues-elon-musk-to-enforce-original-merger-agreement.html> (last updated July 12, 2022, 6:37 PM).

²⁸⁹ Pl.’s Mot. Expedite Proceedings ¶ 1, *Twitter, Inc. v. Elon R. Musk et al.*, No. 2022-0613, Del. Ch. 2022 (filed July 12, 2022).

²⁹⁰ Max Zahn, *A Timeline of Elon Musk’s Tumultuous Twitter Acquisition*, ABC NEWS (Nov. 11, 2022, 2:21 PM), <https://abcnews.go.com/Business/timeline-elon-musk-tumultuous-twitter-acquisition-attempt/story?id=86611191>.

²⁹¹ *Id.*

²⁹² *Id.*

Musk's complete takeover of Twitter raises questions of whether the poison pill is still a valid defense tactic, and whether shareholders are still in fact protected by their board of directors and the corporation itself.

VI. CONCLUSION: ARE SHAREHOLDERS STILL PROTECTED?

The poison pill was created as a defense mechanism to combat hostile takeover bids.²⁹³ The antitakeover defense can be implemented easily and without approval of the corporation's shareholders.²⁹⁴ Once the defense is triggered, the pill allows each shareholder, except the acquiror, to purchase additional shares of the company at discounted prices;²⁹⁵ thus, resulting in significant dilution to the acquiror and making the acquisition more expensive.²⁹⁶ In *Moran*, the Delaware Supreme Court upheld the poison pill and established the need for intermediate scrutiny when assessing challenges to a poison pill brought by shareholders.²⁹⁷

"The hostile takeover regulatory scheme has evolved."²⁹⁸ Of all the key features in the corporate control market:

Poison pills favor company board of directors. However, this favoritism is *at the expense of the shareholder's fundamental right to sell their shares*. The favoritism has also allowed inept and fraudulent company leaders to negatively affect key stakeholders, including the general public.²⁹⁹

Shareholders are at a disadvantage because poison pill legislation affords the company's board of directors "too much control."³⁰⁰ Given the vast authority and control:

Boards can deny shareholders access to fair offers. They can also adopt poison pills quickly without shareholder approval. Boards have the ability to repel acquirers by making the acquisition too costly. They use the poison pill to dilute acquisition efforts and increase the time it takes to acquire a

²⁹³ Ji, *supra* note 11, at 223.

²⁹⁴ Braendal, *supra* note 16, at 655.

²⁹⁵ Ryder et al., *supra* note 255.

²⁹⁶ Saulsbury, *supra* note 20, at 137.

²⁹⁷ *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1357 (Del. 1985); *see also* *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

²⁹⁸ Robinson, *supra* note 142, at 20.

²⁹⁹ Robinson, *supra* note 142, at 20 (emphasis added).

³⁰⁰ Robinson, *supra* note 142, at 20.

company by replacing a board.³⁰¹

Ultimately, it is up to the target corporation's board, not its shareholders, to decide if a poison pill should be used as a defense mechanism to combat a hostile takeover bid.³⁰²

Under the business judgment rule, a board must act in the best interest of the corporation and its shareholders when making business decisions—e.g., how to respond to a takeover bid.³⁰³ When the board addresses a hostile takeover attempt without the best interest of the corporation and its shareholders then they have breached their fiduciary duty of care.³⁰⁴

However, without an impactful say in a poison pill's implementation, is the value of shareholders' basic rights (voting, electing, and suing) being lessened by the board? Yes. As discussed, shareholders lose some of their most valued rights when the board adopts a poison pill. Poison pills favors the board of directors, but only at the expense of its shareholders.³⁰⁵ In some circumstances shareholders lose out on the right to sell their shares—their personal property. If taken seriously, shareholders' right to sell would not be interfered with by the board of directors.

³⁰¹ Robinson, *supra* note 142, at 2.

³⁰² *Martin Lipton*, *supra* note 35; *see also* Hurt, *supra* note 7, at 150.

³⁰³ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).

³⁰⁴ *Saulsbury*, *supra* note 20, at 136.

³⁰⁵ Robinson, *supra* note 142, at 20.

