Activism

Williams Pill Breaches Director Fiduciary Duty: Wolosky

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Olshan Frome Wolosky LLP partner Steve Wolosky

The activist investor attorney defended his lawsuit targeting the energy giant's 5% poison pill in a Delaware trial, while director Casey Cogut said he proposed the low-threshold provision to discourage activists amidst a pandemic.

Activist attorney Steve Wolosky on Tuesday, Jan. 12, defended his lawsuit targeting a 5% poison pill at Williams Cos. (WMB) in Delaware Chancery Court, arguing that it "breaches the fiduciary duty of directors" and would "chill" conversations among shareholders generally.

At issue is a pill plan adopted by the energy company in March, amidst a Covid-19 market meltdown, that is triggered when an activist investor accumulates more than 5%. The pill is unusual partly because most pills are triggered when an investor accumulates 10% to 20% of shares, though the Williams provision also provides an exemption to passive investors if they want to accumulate a greater stake.

Poison pills were originally set up to discourage hostile bidders, but more recently, and especially with the Williams pill, they have been installed to discourage activists.

Wolosky, a partner at Olshan Frome Wolosky LLP, filed the lawsuit, which is under consideration by Delaware Chancery Court vice chancellor Kathaleen McCormick, in August. The court held a virtual hearing on Tuesday and Wednesday, and is expected to wrap up mid-day Thursday. A decision is expected in the coming weeks.

An attorney late Wednesday told The Deal that McCormick hadn't provided any hint of how she might rule on the suit.

The Wolosky lawsuit also targets a controversial provision in the Williams pill that says an investor is considered to be "acting in concert" with another investor when "each person is conscious of the other person's conduct and this awareness is an element in their respective decision-making process." Based on this provision, if two investors together owned more than 5%, they could trigger the pill.

The suit contends that if one investor tried to "influence" control of the company, another needs to be "conscious" of that conduct for the provision to be triggered — if they cumulatively owned 5% or more.

In his testimony, Wolosky said that the Williams "acting in concert" provision is a particularly difficult provision to work through because a company's board determines whether two investors are acting "in concert or parallel" and as a result could trigger the pill. "A discussion could potentially trip this pill, depending on the board's interpretation," Wolosky said.

Wolosky also took issue with a provision known as "daisy chain language" in which "a person who is acting in concert with another person shall be deemed to be acting in concert with any third party who is also acting in concert with such other person."

The activist defense attorney argued it chilled communications.

"Shareholders tend to like to talk to each other generally about companies and investments without necessarily wanting to work together," Wolosky said. “Those conversations — or the potential to have those conversations — would be severely impacted by the [pill]”

The defendants argued in their brief that the pill doesn’t represent an entrenchment of the board because directors can still be removed in a proxy contest. However, Wolosky pushed back on the assertion, noting that proxy contests are expensive and activist investors often seek to talk to other investors to gauge their perspectives before deciding whether to launch a contest. He suggested that investors might be discouraged from talking to investors, over concerns that the pill would be triggered, and may have to “proceed blindly.”

Williams’ attorney, Mari Byrne, counsel at David Polk & Wardwell LLP, noted that Wolosky waited until August to file his lawsuit, even though the pill was adopted in March. She also asked Wolosky if he was aware of anyone seeking to “replace” Williams’ board but couldn’t because of the pill. Wolosky, who advises activist investors, said he was not aware of any director contest at the energy giant.

Williams director Charles “Casey” Cogut, a retired Simpson, Thacher & Bartlett LLP partner and a key proponent of the energy company's 5% threshold, also testified Tuesday.

Cogut said he proposed that management consider the low-threshold pill, and that he supported the measure because it could discourage activist investors from targeting the company during the pandemic. Williams shares plummeted in March, when the pill was adopted to as low as $11.53 a share, before recovering significantly in April and May. Williams traded recently at $22.24 a share.

Cogut said the pill was intended to put a halt for a year “any activism that would influence control of the company at an aggregate level above 5%” and that he thought other companies should consider adopting similar provisions.

“I was thinking about insulating management from opportunistic buyers of 5% of the company,” he said. “I felt the uncertainty created by the pandemic was clearly a sufficient concern for this corporate action.”

Ronald Orol

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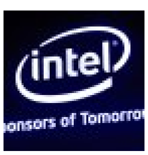

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COMPANIES MENTIONED

Williams Cos. Inc. **Court Cavendish Ltd.** **Simpson Thacher & Bartlett LLP**

The Aftermarket **Davis Polk & Wardwell LLP** **Olshan Frome Wolosky LLP**

Court Of Chancery Of The State Of Delaware

PEOPLE MENTIONED

Steve Wolosky | Kathaleen S. McCormick | Bill Williams | Charles (Casey) Ingram Cogut | Claiborne S. Newlin | Mary Byrne | David Cogut | Tom McCormick

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