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Williams Expert Says Poison Pill No Threat To Shareholders

By **Jeff Montgomery**

Law360 (January 14, 2021, 6:09 PM EST) -- An attorney for stockholders challenging an unprecedented "poison pill" shareholder rights measure adopted by The Williams Cos. pushed back Thursday on an expert's testimony before the Delaware Chancery that the provision was unlikely to hamper most shareholders.

Michael J. Barry of Grant & Eisenhofer PA, counsel to a stockholder class challenging Williams directors' approval of the one-year provision in March 2020, asked a proxy solicitation expert retained by the pipeline giant to acknowledge that the poison pill could restrain more than activist or shareholder attempts to replace board members.

Williams' measure was designed to give a major boost to board-aligned voting power to defend against one or a group of investors that hold 5% or more of the pipeline company's stock if they take an action viewed as an attempt to influence or change control of the company.

Groups of investors, including those who may be unaware of the others, can be counted toward the 5% threshold, a provision aimed to stop takeover bids by so-called investor "wolf packs."

"The Williams pill limits the ability for an investor to consider a proxy contest, to engage in prelaunch due diligence? It limits and restricts the ability of the stockholder to engage in that kind of analysis?" Barry asked Bruce Goldfarb, CEO and co-founder of proxy solicitation and specialty advisory firm Okapi Partners LLP, an expert called by the company.

"The Williams pill may limit the ability of some investors to discuss some control issues," Goldfarb acknowledged during the trial before Vice Chancellor Kathaleen S. McCormick.

The investors sued in August to block Williams from deploying the measure and to get a ruling that the board's members breached their fiduciary duty by adopting it.

Williams director Charles I. Cogut, who retired from Simpson Thacher Bartlett LLP in 2012 and joined the company's board in 2016, had testified on Tuesday that he recommended the pill as a defensive move after a steep drop in Williams' stock price brought on by a global energy price war and the pandemic-related economic slowdown.

Cogut said he felt that uncertainties created by the pandemic along with the risk of takeover or other activist moves were "clearly a sufficient concern" warranting the provision.

The stockholder class suit countered that Williams' poison pill represented "a deliberate attempt to curtail activity by and among stockholders," and argued that the 5% trigger was far lower than the ordinary 15% threshold found in most cases, and far more easily triggered.

Attorneys for the stockholders went further, asserting in a pretrial brief unsealed late Tuesday after the trial began that "boards cannot take a 'year off' from stockholder activism by reflexively deploying the most devastating defensive device known to corporate law."

The brief described the measure as "a novel pill, divorced from control concerns and untethered to

precedent. And it bears repeating: This pill was designed not to distinguish between activism pursuing corporate benefit, on the one hand, and activism pursuing pecuniary self interest, on the other. It makes no difference. All activism is targeted."

Brian M. Burnovski of Davis Polk & Wardwell LLP, counsel to Williams, asked Goldfarb if a study his firm conducted of 92 stockholder proxy actions by various companies, in which dozens were successful or settled, would have come out differently if a shareholder rights plan had been in place.

"I don't believe the rights plan would have been an impediment to any of the campaigns," Goldfarb said, noting that communications among investors after a proxy launch would not be impaired by Williams' measure.

He added that the 5% threshold, at Williams' current stock price, would amount to more than \$1.1 billion of stock, and would have represented around \$650 million in March 2020, when the plan was enacted. By comparison, Williams' board accounts for only about 0.3% of its market capitalization, Goldfarb said.

Barry focused on the wide reach of the restrictions during cross-examination.

"You will agree that a poison pill with a trigger of 5% or less is highly unusual, or in your words, 'not customary,'" he asked Goldfarb. "In fact, you've never worked at a company that had a poison pill with a trigger of 5% or less that did not involve the protection of net operating losses."

Barry also asked Goldfarb if he agreed that the language of the pill is not restricted to an intent to change a majority of Williams' board.

"It could relate to an effort to change less than a majority of the board. It could relate to efforts to encourage the board to replace the CEO, correct?" Barry asked, adding that the pill also could be triggered by a stockholder push for environmental, social or governance measures.

Vice Chancellor McCormick said at the end of Goldfarb's testimony that she would await proposals from both sides for post-trial briefing schedules.

The stockholders are represented by Gregory V. Varallo, Mark Lebovitch and Thomas G. James of Bernstein Litowitz Berger & Grossmann LLP, Michael J. Barry, Christine M. Mackintosh and Kelly L. Tucker of Grant & Eisenhofer PA, and Jeremy S. Friedman and David F.E. Tejtzel of Friedman Oster & Tejtzel PLLC.

Williams is represented by William M. Lafferty, Kevin M. Coen, Lauren K. Neal and Sabrina M. Hendershot of Morris Nichols Arshat & Tunnell LLP, and Andrew Ditchfield, Brian M. Burnovski and Mari Byrne of Davis Polk & Wardwell LLP.

The case is *The Williams Cos. Stockholder Litigation*, case number 2020-0707, in the Court of Chancery of the State of Delaware.

--Editing by Adam LoBelia.