



## DEALMAKERS OF THE YEAR

# The Ugly Battle Over Botox

In a year filled with hostile bids, the Allergan-Valeant fight had it all: Strange alliances, trash talk, lawsuits—and plenty of scorched earth.

BY JULIE TRIEDMAN

**T**OWARD THE END OF THE BOSTON Marathon last April 21, the only thing keeping Cary Hyden going was the promise of a hot shower, a nap and, he says, a “decent restaurant meal.” But that was not to be. When Hyden, head of Latham & Watkins’ Orange County corporate group, got to his hotel room, he found several missed calls from his partner Paul Tosetti. Longtime client Allergan Inc., maker of the anti-wrinkle drug Botox, had received a \$45.6 billion cash-and-stock offer from Canada’s Valeant Pharmaceuticals Inc.

Allergan, a company with little long-term debt and an active research and development program, wanted no part of Valeant, which mostly grew by buying successful rivals and cutting back on R&D. Allergan had already rebuffed one expression of interest from Valeant. But this time, Pearson had backup: the brash activist investor William Ackman and his hedge fund Pershing Square. As part of a self-styled joint bid, Ackman had quietly accumulated nearly 10 percent of Allergan’s stock. Over the next 24 hours, Hyden and Tosetti helped Allergan adopt a poison pill; the provision allowed shareholders to buy stock blocks at a discount if anyone obtained a 10 percent stake, making a takeover prohibitively expensive.

Last year was filled with hostile

takeover activity [see “Hostile Deals,” page 56], but the long Allergan-Valeant battle was the nastiest of them all. It utilized top talent at some of the nation’s preeminent firms: Latham, eventually fortified by Wachtell, Lipton, Rosen & Katz, for Allergan; Sullivan & Cromwell and Skadden, Arps, Slate, Meagher & Flom for Valeant; and Kirkland & Ellis for Pershing Square. It was predicated on a novel legal strategy devised by an unusual pairing of bidders. The next seven months were pure boardroom drama, punctuated by public relations campaigns, charges of misrepresentation, poison pills, escalating bidding, litigation in two states, and, finally, a rescue by a once-spurned white knight.

For many, the intensity of the fight generated comparisons to the yearlong war over Airgas Inc. in 2010 and 2011. For some, the memories went back even further. Latham’s Tosetti says the constant PR and court battles reminded him of the 1980s, when he was a young associate working on Drexel Burnham Lambert deals. As in those days, litigation proved determinative. “Back in the ’80s, the first thing you’d do was sue people,” he says. “These days, it’s gotten almost clinical.” There are fewer gray areas to litigate, and institutional investors “don’t want you to waste money in court,” he says.

“This was a war, I mean a real war,” says Kirkland litigator Mark Holscher, a former federal prosecutor who is still

Valeant’s  
April 2014 Opening Bid  
for Allergan:

**\$45.6**  
BILLION

Current Sale Price:

**\$71**  
BILLION



handling fallout litigation from the fight on Pershing Square's behalf. Allergen's lawyers at Latham and Wachtell, he says, "had a really brilliant strategy."

#### **HATCHING THE PLAN**

Even before there was a bid for Allergan, there was a plan. In January 2014, a senior Pershing Square adviser approached Valeant CEO J. Michael Pearson at a conference to ask whether the hedge fund could collaborate on a Valeant acquisition.

Pearson was interested, especially since using debt to finance a major deal was not an option. Valeant was already carrying \$17 billion in debt from previous acquisitions. Its bonds had a junk rating, and rating agencies would threaten an additional downgrade that spring. And Ackman was a veteran of successful proxy campaigns, though his credibility had been damaged in a bruising battle with Herbalife, a

#### **The Californians**

Latham's Cary Hyden (left) and Paul Tosetti



## The Inside Story

supplements company he had shorted.

Ackman dispatched his longtime Kirkland counsel, Stephen Fraidin (now a vice chair at Pershing Square), to meet with Valeant's lawyers at Skadden. Buying stock as part of a joint effort with a strategic bidder was very unusual, and Pershing Square had to make sure it would not violate insider trading laws, specifically a provision known as the Williams Act that prohibits cashing in on inside knowledge that someone else is planning a tender offer.

Fraidin sought out Kirkland partner Robert Khuzami, a former head of the U.S. Securities and Exchange Commission's Enforcement Division, who assured Fraidin that Pershing Square wouldn't run afoul of criminal insider trading laws. Valeant received similar assurances from Sullivan and Skadden. The hedge fund would be viewed as an exempted co-bidder entitled to trade on the inside information. But to avoid triggering the Williams Act, Pershing Square and Valeant would need to make

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sure they took no substantial steps toward a tender offer while Pershing Square was accumulating Allergan stock.

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Pearson quickly settled on Allergan as his target. It looked like easy prey. Prompted by a gadfly shareholder, Allergan's board had recently stripped away most of the company's anti-takeover defenses, eliminating a staggered board and enacting an unusual provision allowing investors holding a quarter of outstanding shares to call a special meeting.

Over the next two months, Fraidin and his deputy, 35-year-old first-year partner Richard Brand, hashed out binding agreements with Sullivan's Alison Ressler and Skadden's Stephen Arcano.

The agreements called for Ackman to accept Valeant stock as payment, saving Valeant billions in acquisition costs. Ackman also committed to loan Valeant an additional \$400 million if Valeant wished, to pay Valeant 15 percent of any profits earned on the stock the hedge fund would buy, and to hold on to Valeant shares for a year after the deal closed. In return, Ackman would reap 85 percent of any share price increases—or be hit with losses if Valeant's stock price dropped. Says Fraidin: "There was a significant risk that Allergan would do a value-destroying deal."

### A MISSED DEADLINE

Pershing Square would make its stock acquisitions quietly, via the purchase of options by a newly created entity. Unlike

a drug company such as Valeant, its stock accumulation didn't trigger an early antitrust review. On April 11, Pershing Square and Valeant, which had chipped in \$75 million (just under the amount requiring antitrust review), crossed a crucial 4.9 percent SEC threshold. They then would have 10 days to stockpile shares before the SEC required them to disclose their holdings. By April 21, the day they filed the disclosures, Ackman had bought \$3.2 billion worth of shares. In one day, the value of Ackman's stock shot up by nearly \$1 billion.

But the timing of the move left Latham's lawyers scratching their heads. Pershing Square and Valeant had just missed a perfect opportunity to push for new deal-friendly directors at Allergan's May 6 annual meeting. All were up for reelection. If Allergan's board didn't want to deal, Valeant and Pershing Square would have to push for a special meeting, leading to months of delays. "It was a fundamental error," Hyden says.

In addition, there was skepticism about the Williams Act analysis by Kirkland, S&C and Skadden. "The structure is crafty, and good for Valeant and Pershing Square (as long as no bad facts emerge, such as undisclosed arrangements, that could get them in trouble)," Wachtell wrote in a memo warning of a new takeover threat and

appealing to the SEC to shut it down.

In May, with its lead independent director under pressure from Ackman to meet, Allergan brought on Wachtell's David Katz and Daniel Neff, who had successfully defended other companies, including Airgas, in hostile campaigns, as additional board counsel. They advised playing a long game. Allergan had a solid growth record, they contended, and given time, could outperform market expectations. In contrast, Valeant looked vulnerable. With a coordinated strategy to push down Valeant's stock price, Allergan could make the deal much more expensive for the bidders and corrode shareholder interest in the deal. "Because so much of their offer was in stock, it gave us a lot to shoot at," Katz says. To help with the effort, the team hired a PR adviser and two forensic accounting firms to poke into Valeant's business.

On May 12, Allergan formally rejected Valeant's offer, saying that it "grossly undervalued" the company. But if anyone could get through Allergan's defenses, it was Ackman, who could press his case in ways that Valeant, as a public company, could not. And Katz and Allergan's financial advisers suspected that Ackman had the support of a far larger group of aggressive investors known as arbitrageurs, who pressure companies into transactions, taking advantage of the resulting stock movements. If a clear majority of shareholders wanted a Valeant deal, they could find a way.

To find that way, however, they'd have to get around three stumbling blocks in Allergan's charter documents, including two bylaw provisions drafted the previous year



by Latham and Richards, Layton & Finger. Language in the charter suggested that Allergan's poison pill might be triggered by any communication between Pershing Square, Valeant and Allergan shareholders, including the special meeting solicitation. And a bylaw provision required those calling a special meeting to jump through hoops to obtain shareholder consents. Rather than simply requiring each participant to check a few boxes on a postcard-sized form, the bylaw required pages of detailed disclosures about trading histories going back two years, stock positions and entities in which shareholders held a substantial stake, as well as those entities' holdings. A third bylaw gave the board 120 days to set the date of a special meeting once the requisite consents were delivered.

To circumvent the delays built into the process, Pershing Square called for an informal stockholder referendum directing Allergan to negotiate with Valeant. But the referendum, which Allergan's lawyers referred to internally as a "shamerendum," was nonbinding and was dropped three weeks later.

That wasn't the only rapid reversal. Bowing to pressure by Ackman, who believed that Allergan investors would demand a higher price, Valeant made a second offer, on

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May 28, and then raised it again on May 30. The tactic gave the market the sense that the bidders were competing against themselves. Says Katz: "Our response was, 'Why didn't they put their best foot forward the first time?'"

### THE BEDBUG ATTACK

Perhaps the biggest error, say lawyers on both sides, was Valeant's decision to take its offer directly to shareholders via a tender offer. Ackman was feeling pressure from arbitrageurs to show resolve, he and his lawyers say. Before Allergan had even responded to the May 30 revised offer, Valeant announced a binding tender offer. Latham quickly appealed to the SEC, claiming that Valeant should have disclosed its potential Williams Act liability. The 30 or so "bedbug letters" (intended, lawyers say, to "rouse regulators from their slumber") ultimately failed to stop the offer, but approval took six weeks—a "meaningful delay," says Hyden.

Meanwhile, Pershing Square announced that it would solicit shareholder support for a special meeting and proxies to replace Allergan's board. But its lawyers failed to get assurances from Allergan that the solicitation wouldn't trigger the poison pill.

On June 12, after Allergan rejected Valeant's revised offer, Valeant and Pershing Square struck back.

Kirkland's Jay Lefkowitz and Young Conaway Stargatt & Taylor's David McBride went to the Delaware Court of Chancery, seeking to enjoin Allergan from enforcing the pill. Allergan folded in two weeks, but by then it had initiated a PR front in its war against Valeant. In SEC filings and public statements, Allergan criticized Valeant's business model as "unsustainable," and in shareholder communications, it quoted analysts who had called Valeant's growth strategy "deceptive" and "a house of cards." On June 11, Allergan CEO David Pyott met with major Valeant shareholders; the next day, Valeant's share price dropped from \$125 to \$120.

The trash-talking peaked in July, when Allergan asserted in an SEC filing that sales at Valeant's newly acquired Bausch & Lomb unit were softer than Valeant had said and highlighted "numerous inconsistencies and omissions" in Valeant's second-quarter earnings statement. Valeant's lawyers complained to regulators in the U.S. and Canada about Allergan's alleged false statements, but little came of it.

The constant hammering hurt Valeant. From a post-bid high of \$137 on April 22, its stock price slid a third by August. "They were very effective in talking down the stock," says one insider on the acquirer side. "It certainly got under Pearson's skin," says Katz.

Concurrently, Allergan's Pyott was propping up his company's stock price. Taking a page from its pursuers' proposals, he announced major layoffs and some R&D cutbacks. Second-quarter sales were unexpectedly good. From a low of \$116 before the April bid, Allergan's stock surged to the \$160 range over the summer. Together, the strategies would make any Valeant acquisition of Allergan much more expensive.

### "THEY SCREWED UP"

Throughout July, Brand was laboring to collect the special meeting consent forms. Ackman's alone required disclosures from about 100 related entities. As Brand neared sufficient shareholder support, Latham rolled out its litigation strategy, aiming at the deal's structure. On Aug. 1, the company filed suit in federal district court in Santa Ana, California, alleging that its pursuers had violated insider trading laws under the Williams Act and shouldn't be permitted to vote their shares at a special meeting. Joining the suit was Allergan shareholder Karah Parschauer, Allergan's assistant general counsel, who had sold stock at a time when Ackman was accumulating shares. She claimed that the secret deal cost her about a half a million dollars in potential earnings. "We would not have had a case if they had not moved for a tender offer," says Katz. "They screwed up."

On Aug. 22, as Brand delivered about 1,500 pages of forms representing 30 percent of shareholders to



Allergan, Pershing Square went on the offensive, asking a Delaware judge, Chancellor Andre Bouchard, to strike Allergan's bylaws and to compel the company to call the special meeting. On Sept. 18, a ruling against Allergan appeared imminent. "This is quite a horse-choker of a bylaw," Bouchard told Allergan's lawyer, Wachtell's Theodore Mirvis. "Tell me what the defense to that is." Within hours, Allergan agreed to hold the special meeting—in three months.

For Valeant, it was a hollow victory. "The bylaws played exactly the role they were designed to play," Hyden says. "Our client got the time it needed."

Allergan used that time to consider a competing offer from Actavis as well as a possible takeover of Salix Pharmaceuticals Ltd. The \$10 billion combination with Salix would have made Allergan too large for Valeant to swallow. Allergan rejected the Actavis bid in August and dropped the play for Salix in September. All of Allergan's chips were now on the California court.

With two months to go before the special meeting, Ackman and Pearson flew to California on Oct. 20 for a hearing on a preliminary injunction. "We wanted to show that we took this very seriously. We were being accused of a significant violation of insider trading laws," says Brand. He recalls that for eight hours, he sat beside Ackman, thinking, "Boy, if this goes badly, I'm going to be the first person he yells at."

In a mixed decision issued on Nov. 4, U.S. District Judge David Carter ruled that Pershing Square and Valeant could vote their shares as long as they disclosed their unresolved insider trading liability in offering documents. But he also concluded that Allergan had raised "serious questions" about whether insider trading had been committed.

The ruling threw Allergan's team into overdrive. The next day, rebooting talks that Allergan had dropped two months earlier, Hyden and Katz delivered a confidentiality agreement to Actavis' counsel at Cleary Gottlieb Steen & Hamilton. Late on Nov. 16, after just 11 days of negotiations, Allergan's board approved Actavis' \$66 billion offer. Actavis had topped Valeant's May 30 bid by \$39 a share.

Pearson quickly conceded, withdrawing Valeant's offer and noting that he could not justify paying \$219 or more per share for Allergan. At press time, the Actavis deal was expected to close in late March.

## THE AFTERMATH

After a fight that took up most of 2014, where do the players stand? For the firms and other advisers, the effort was lucrative. Combined, the advisory teams' work cost Valeant and Pershing Square at least \$200 million; bank finance and advisory fees totaled about another \$150 million. Allergan paid roughly \$128 million to its advisers and \$112 million to its banks. Actavis paid \$506 million in advisory and bank fees.

Allergan, which had already slashed 13 percent of its workforce last July, now faces \$400 million more in cost-cutting by Actavis, though not the \$900 million Valeant proposed. In holding off Valeant and accepting the Actavis deal, now valued at about \$71 billion, Allergan's shareholders are poised to reap about \$75 more per share than they would have from Valeant's original offer. Ackman sold his Allergan stake for a \$3 billion profit, while Valeant's share earned it \$293 million. Valeant's bruised stock price had recovered by March, surpassing \$200, and the company struck an \$11 billion deal to acquire Salix, which Allergan had passed on last September. As for Actavis, it announced in February that it would rename itself. The new name: Allergan.

Individuals also benefited. Brand's career has taken off; he is now advising Macerich Co. in its defense of a \$22.4 billion unsolicited bid by Simon Property Group Inc., represented by Latham, this time in the hostile role. Fraidin, 75, left Kirkland for his new job at Pershing Square in January.

Meanwhile, Ackman and Valeant face high-stakes litigation, not just in Allergan's suit but in shareholder class actions demanding the return of both parties' profits on the Allergan deal. "It's not just pure financial liability, it's the reputational harm," says NYU's Coffee. The "serious questions" raised in Allergan's suit, he writes, may deter other "lucrative one-night stands between ardent Prince Charming suitors and less-than-bashful maiden hedge funds."

And what about the plan that started it all? Ackman calls the controversial pairing "100 percent legal"—and says he's likely to use it again.

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