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Cooley double-teams for fast $190M biotech deal

Deals

Tender offers can be viewed as a quick route to an acquisition, with the offer typically arriving a week or two after the merger agreement is signed. Lawyers at **Cooley Godward Kronish** cut that time to a day by dividing into teams that handled elements of a $190 million biotech buy concurrently rather than one by one.

"You often do them serially," said partner **Suzanne Sawochka Hooper,** whose team represented Kosan Biosciences Inc. in its acquisition by Bristol-Myers Squibb Co. The deal, announced May 29, gives New Jersey-based Bristol-Myers two new classes of anti-cancer medicines being developed by Hayward's Kosan.

"It's the first time I worked on a transaction where the tender offer launched essentially at the same time that we signed the merger," Hooper said. They were able to launch the tender one day after inking the deal despite a special insurance policy, in the form of a license agreement, stitched in to protect the interests of both companies in case the merger fell through.

Hooper said the lightning speed was possible because lawyers ran simultaneous teams: one that hammered out the merger agreement, one working on the tender offer documents, and another team creating the separate license agreement for one class of Kosan's medicines. Under the license agreement, Bristol-Myers agreed to pay $25 million up front and up to $400 million in milestone payments based on the development of Kosan's cancer medicines and royalty payments on net sales. In return, Kosan grants Bristol-Myers an exclusive worldwide license to those medicines and related intellectual property and data. "It's a pretty rare structure, designed to protect both companies in the event that the transaction doesn't close for some reason," Hooper said.

Kosan General Counsel Jonathan Wright said the license agreement demonstrated how serious Bristol-Myers was about a relationship with his company. And although negotiating a separate license agreement added a level of complexity to the transaction, it affords Kosan a measure of security in case the merger deal doesn't close by shoring up its finances with the licensing money.

"Bristol-Myers wanted to make sure that if the deal didn't close they'd still have a partnership with us," Wright said. The advantages were significant for Kosan as well, he said, because "when you're negotiating with someone for purchase of a company, it's difficult to go out and get financing at the same time."

"It's a very tough market," Wright said, noting in today's environment you have to sell more of your company to raise needed capital.

Once the merger agreement closes, the license deal is voided, Wright added.

Wright said the company doesn't comment on details of negotiating the value of the deal, but that Kosan's financial adviser, Lazard Freres & Co. LLC, labeled the deal a fair value to Kosan shareholders. According to SEC filings, the $5.50-per-share offer price represents a 229 percent premium on the closing price of the common stock on May 27, the last trading day prior to the execution of the merger agreement, and a 191 percent premium to the one-month spot price of the common stock prior to the execution of the merger agreement.

Also working on the transaction were Cooley partners **Chadwick Mills** and **Robert Jones,** special counsel **Francis Fryscak** and **Ann Polus,** and associates **Michelle Sonu Park, Shane Albright, Mark Bradford, Patty Cheng, Tina Duan** and **Brandee Shtevi,** all of the Palo Alto office.

Lawyers from the New York office of Cravath, Swaine & Moore represented Bristol-Myers Squibb, whose in-house legal department was led by Vice President and Senior Counsel Joseph Campisi.

— Petra Pasternak