Business Day

The New York Times

SUNDAY, MAY 16, 2004

DEALBOOK

ANDREW ROSS SORKIN

Private Equity Funds For the Masses

WANT a piece of Henry R. Kravis? Soon it may be yours for the asking.

Kohlberg Kravis Roberts and more than a dozen other buyout firms are tripping over one another in a race to sell funds to the public, opening up their once-exclusive investment clubs. In the past month alone, blue-chip firms from **Thomas H. Lee Partners** to the **Blackstone Group** to **Gleacher Partners** have announced plans to create new investment funds and hope to sell more than $6 billion in shares to the public.

Wall Street is aflutter, but buyer beware: these new funds may carry the cachet of "smart money," but they are more like expensive knockoffs, loaded with enormous risks, extra costs and conflicts.

Thomas H. Lee Partners, which made its name buying Snapple in 1992 for $135 million and selling it two years later for $1.7 billion, cautioned prospective investors in its prospectus, "You are not acquiring an interest in T.H.L. private equity funds and our returns, if any, may be substantially lower than those funds." Blackstone's prospectus even includes a surprisingly explicit warning label: "There Are Significant Potential Conflicts of Interest."

On the surface, the new funds may seem a poor man's version of the private equity funds that have generated double-digit returns since the 1980's. Hoping to capitalize on the public's appetite for better-than-average returns when interest rates are still low, the firms are creating public closed-end funds to invest in the debt, and in some cases the equities, used in leveraged buyouts. (In a closed-end fund, a finite number of shares are sold and can trade at values considerably higher or lower than the underlying assets.)

But the second-class status of the new funds is obvious once you realize that almost none will be invested alongside the private funds in the same companies. That may solve one conflict of interest, but it creates an even thornier issue: the public fund has the potential to become a wastebasket for investments that the private funds either passed on or erred on.

The Kohlberg Kravis Roberts prospectus seems to say as much: "K.K.R. does not pursue numerous investment opportunities that come to its attention because they do not fit within the investment mandate of its

private equity funds. We expect that the investment adviser will be able to access these potential investment opportunities" for the public fund.

K.K.R. and others rationalize this by saying that their private funds typically take majority positions in big companies. The public funds, they argue, will give them the flexibility to invest in companies that do not meet their private-fund criteria. "We're leaving deals on the table," one private-equity executive said in explaining the attraction.

But that still doesn't square. The firms are leaving some deals on the table for a reason: they may not be so good.

The other big conflict is spelled out in the prospectus of Apollo Investment Management, part of **Apollo Advisers**. Apollo's private funds, it reads, "may from time to time have overlapping investment objectives" with those of the public fund. "As a result, the partners of Apollo Investment Management will face conflicts in the allocation of investment opportunities to other Apollo funds," it says. "When the partners of Apollo Investment Management identify an investment, they will be forced to choose which investment fund should make the investment."

So, which fund do you think will get the next great deal? The public one, where the investment has already been raised and will remain in perpetuity, or the private one, which depends on a constant infusion of cash from discerning investors?

These funds do not pose problems just for public investors. They are also creating agitation among some big institutional clients. "I don't want the guys I'm investing with to be spending one second worrying about anything else than my money," one prominent investor said — a sentiment that has been echoed by others.

Why rush these funds to market? The answer appears to be the payday that the firms and Wall Street investment banks underwriting the offerings stand to make. Both need to beat a closing window to take these funds public before interests rates rise much further, making funds less attractive. Some of the intended offerings may not make it through that window.

The public can join blue-chip clubs, but the memberships appear to be second class.

The private-equity firms plan to take their standard 2 percent management fee and 20 percent of the profits, the way they do with their private funds. But they are also taking a liberty that their private investors would probably laugh at: some are charging investors for direct expenses as well.

Apollo Advisers, founded by Leon D. Black, formerly of Drexel Burnham Lambert, is the only firm so far to take one of these vehicles public, making a quick $17 million in management fees overnight after raising $871 million. And here's a little-known fact: Apollo can double that fee simply by borrowing another $871 million for the fund.

Clearly, a successful offering would be a godsend for a private equity firm: it does away with the trouble of spending six months to a year traveling the country, cup in hand, to raise money from picky investors every couple of years. But should ordinary investors play along? A banker working on underwriting several big offerings said, "I wouldn't put my mother in one of these."

So how is Apollo's offering doing? It closed at $13.08 on Friday, down from its offering price of $15. □

Business Day

The New York Times

SUNDAY, JUNE 13, 2004

DEALBOOK

ANDREW ROSS SORKIN

Backing a Client, And Selling Anyway

GOLDMAN SACHS has long been the go-to firm on Wall Street for companies threatened by hostile takeover bids. For years, the firm has made its name — and billions of dollars in advisory fees — successfully defending businesses under attack from unwanted suitors.

So when **NeighborCare,** a small health care services company, received a hostile offer last month from **Omnicare**, an industry behemoth, whom did it call? Goldman Sachs, of course. On the advice of Goldman Sachs, NeighborCare's board quickly rejected the bid and scurried to open a counteroffensive. It derided Omnicare's $30-a-share offer — a 70 percent premium at the time — as "blatantly opportunistic," calling it an attempt "to deprive our shareholders of the upside that we believe is inherent in our plan."

But there is a problem with this picture that has gone unnoticed for the most part: Goldman Sachs, one of NeighborCare's largest shareholders, has been quietly dumping its shares in the company for months. From Dec. 31, 2003, to March 31 this year, Goldman Sachs reduced its holding by more than 60 percent — to 1.3 million shares from 3.6 million — according to filings. And it continued to sell after that, traders say, potentially contributing to the steep decline in the stock price in May that led Omnicare to make its hostile bid in the first place.

The fact that Goldman Sachs was selling shares in NeighborCare, typically at prices much lower than Omnicare's $30-a-share bid, is hardly a ringing endorsement of the defense strategy it helped to develop for the firm — namely, that the company's shares are undervalued.

That apparent lack of confidence is even more striking when you consider the other ties that Goldman Sachs has to NeighborCare: its investment was one of the building blocks in the founding of the company, formerly called Genesis Health Ventures. And at least two executives connected to Goldman Sachs have served on the board of NeighborCare: Arthur Reimers, a former managing director of Goldman Sachs, is on the board now, and Jo-

Christophe Vorlet

seph A. LaNasa III, a current managing director at Goldman Sachs, is a former member.

But there's more: a day after Omnicare made its offer public, the trading desk at Goldman Sachs made another surprising bet. It bought "calls" of NeighborCare's shares at $30, in effect wagering that NeighborCare would be acquired — a bet against its own firm's ability to defend NeighborCare.

The trade was voided when the compliance department at Goldman Sachs learned of the calls later that day. In its filing with the Securities and Exchange Commission, Goldman Sachs included this footnote: "These securities were purchased in error by Goldman Sachs and subsequently unwound on the same day by Goldman Sachs."

Nonetheless, the attempted trade said a lot, especially if you take a look at the name of the fellow who executed it: Mr. LaNasa, the former board member of NeighborCare.

A spokeswoman for Goldman Sachs said that there was nothing improper about the trade and and that there is a Chinese wall between the firm's trading operations and its investment banking business.

NeighborCare refused to comment directly on its relationship with Goldman Sachs, saying, "We view this as a sideshow and not at all relevant to the real issues here."And what do the research analysts at Goldman Sachs think of NeighborCare? Oddly, the bank does not "cover" the company.

But if the views of other analysts and investors are to be believed, the decision by the trading desk at Goldman Sachs to thumb its nose at its own bankers and sell its shares in NeighborCare may have been the right move.

On Thursday, Joel M. Ray, an analyst at Wachovia, downgraded NeighborCare to underperform from market perform. "While we do not preclude OCR from raising the tender offer price, we sense there is little upside potential to current share prices with the current offer in place," Mr. Ray wrote, using ticker symbols as shorthand for company names. "If, however, OCR is unable to consummate the acquisition, we believe shares of NCRX will fall, possibly to levels prior to the disclosure of merger activity."

NeighborCare's shares, now at $30.51, could fall this week. NeighborCare is planning to formally reject Omnicare's offer again and to present a new plan prepared by Goldman Sachs to enhance shareholder value, executives close to the company said.

Maybe Goldman Sachs will keep selling. That's what friends are for, right? □

Business Day

The New York Times

SUNDAY, JUNE 27, 2004

DEALBOOK

ANDREW ROSS SORKIN

Résumé Buffing, the Wall Street Way

IF you happened to read the news release of **MGM Mirage's** planned takeover of the **Mandalay Resort Group**, you might have been struck by the first sentence of the last paragraph. It said that six Wall Street investment-banking firms had helped advise MGM on the deal. That wasn't a typo. All six were listed: **Morgan Stanley**, **Citigroup**, **Deutsche Bank**, **J. P. Morgan Chase**, **Bank of America** and **Société Générale** of France.

It is not uncommon for companies to hire one or two investment banks to help advise them on a transaction, especially when the deal is complex. Occasionally, companies involved in a hostile takeover have even hired three banks, partly as a defensive measure to prevent them from working for potential interlopers. But who would hire six banks?

Not MGM, it turns out. In fact, with the exception of Morgan Stanley, none of the firms listed as working on the deal had anything to do with it.

No banker from Citigroup flew to Las Vegas. No banker from Deutsche Bank did a valuation analysis. No banker from J. P. Morgan Chase stayed up late putting together a PowerPoint presentation. No banker from Bank of America negotiated a particular sticking point in the deal. And no banker from Société Générale even left Paris.

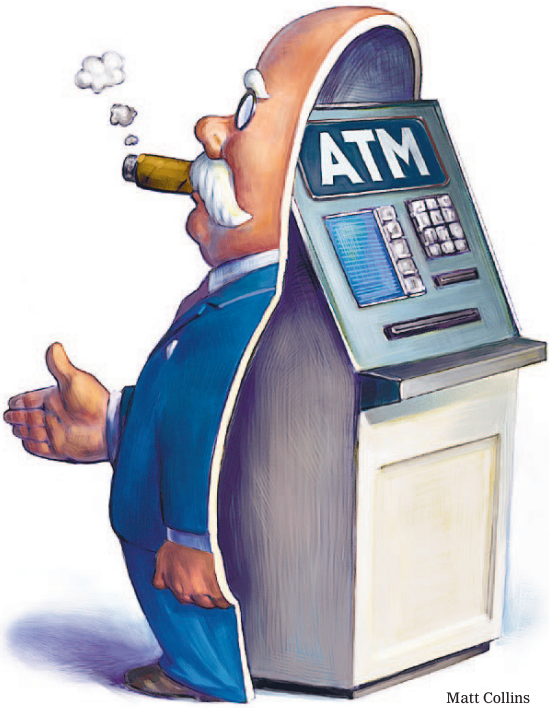
So why did MGM list all those banks?

In what appears to be an increasingly widespread — and potentially misleading — type of back scratching, corporate America is often giving its biggest lenders credit for strategic advisory work, even when they do little or nothing. The corporations do so in hopes of getting better terms on their loans, and the investment banks do so as a way to puff up their own deal lists so they can tell prospective clients and investors that their mergers-and-acquisitions advisory practice has been involved in some of the biggest transactions. Besides, it costs the companies little — or, in the case of MGM, nothing — to add a friendly bank to its advisory team, or to the end of a news release.

The résumé buffing is being fueled by Wall Street's obsession with so-called league tables — rankings compiled every quarter by several big financial services database companies — and the bragging rights associated with them. This week, Thomson Financial will issue midyear rankings, setting a off a new cycle of banker boasting.

At one time, the rankings may have offered a true portrait of the state of the industry, but today the league tables are so skewed by fanciful representations that they can no longer be trusted. To be sure, most firms that have big lending arms have well-established, trusted bankers, but in these instances, what you have, really, are lenders masquerading as strategic advisers. Indeed, any executive or investor who looked at the rankings to make any sort of important judgment about a firm's experience or volume of work would be looking in the wrong place.

And Wall Street is beginning to concede it. Charles Alexander, co-head of European mergers and acquisitions at Lehman Brothers, acknowledged the problem



Matt Collins

last week while speaking on a panel with me in London at the International Bar Association's annual mergers-and-acquisitions conference. "Financing has become a way of buying league table credit," he said. "We all do it. We're not immune."

True, this practice has been going on for years. But it had been under the table and its impact was marginal. Now, the practice seems to be overt and systemic. Just last fall, **Warner Music's** deal with Edgar Bronfman Jr. included an overflow of banker credit, too. Bank of America, Deutsche Bank, **Lehman Brothers** and **Merrill Lynch** — which provided the debt financing — all made the adviser list, as did **Jefferies & Company, AGM Partners**, the media banking boutique, and Gary Fuhrman of **GF Capital**.

And though some of the biggest lenders argue vigorously that their ability to lend provides them with a synergistic opportunity to offer advisory work, they are often added to deals as a second or third adviser simply as a courtesy.

A good question may be why ranking firms like Thomson allow the banks to, in effect, hijack the rankings. The answer, from the man who manages the tables at Thomson, Mark Siciliano, is that "it's a self-policing effort." The banks, he added, can challenge one another's roles if they want. "I guarantee it does go on, but we have limited resources to investigate each deal." And when Thomson does look deeper, he said, "every adviser comes with the same story: they say they were an integral part of getting the deal done." □

Business Day

The New York Times

SUNDAY, AUGUST 22, 2004

DEALBOOK

ANDREW ROSS SORKIN

Wall Street Is Ogling the Real Google Payoff

DID **Google** take Wall Street, or vice versa?

Much has been made of the cut-rate fees **Morgan Stanley** and **Credit Suisse First Boston** accepted to underwrite Google's initial public offering. Instead of 7 percent of the offering's total —the industry standard — the banks were strong-armed by the Wall Street-hating founders of Google into taking a measly fee of 2.8 percent of the $1.67 billion raised in the auction.

That's not chump change — the banks divvied up some $47 million — but for an industry that is watching its profits erode, the deal has some nervous bankers grumbling. In fact, after paying to build complex new computer systems to manage the unorthodox auction and doling out ridiculously outsized salaries to the bankers who have worked on the offering for nearly a year, the banks won't make much, if anything, on the deal.

But critics of the banks miss the point. The I.P.O. was never about the money. It was a loss leader for the next deal — the Google Gravy Train to come or, in Hollywood parlance, a piece of the back end. In the next several months and even years, Google will probably be unloading millions of additional shares on the stock market. You can bet your lunch reservations at the Four Seasons that Morgan Stanley and First Boston will be at the head of the line to do those secondary offerings — and they won't be accepting the same stingy fees.

That's just the start. The banks' private wealth management groups are sure to be cozying up to some 2,000 Google employees who have become millionaires on paper, hoping to manage their new fortunes. And yes — ka-ching — they will charge a no-discount fee, too.

The banks also plan to lend a helping hand to those employees selling shares, taking a commission with every transaction. Next month, the first set of lockup agreements restricting the sale of shares by current and former employees will expire, opening the floodgates on 4.6 million shares. Another lockup period expires in 90 days, potentially putting 38.5 million more shares in play. And 24.3 million more shares could hit the market after 120 days and an additional 24.3 million in 150 days. The biggest wave is after 180 days, when 171 million more shares will become unrestricted.

Google's founders, Sergey Brin, 30, and Larry Page, 31, each sold fewer than half a million shares, or 1.25 percent of their holdings. They had planned to sell much more into the initial offering, but decided at the last minute to hold onto them because of worries that demand was weaker than expected. Google's chief executive, Eric Schmidt, 49, sold just 2.5 percent of his holdings rather than the 5 percent he had planned to unload. They are all sure to be selling more soon.

Then there are the venture capital firms: **Sequoia Capital** and **Kleiner Perkins Caufield & Byers** had originally planned to sell 10 percent of their holdings in the company, a total of 4.5 million shares, but decided to hold on. They won't sit on the sidelines much longer. Their business model calls for them to "exit" their investments eventually. And Morgan Stanley and First Boston would sure like to help.

Now that Google has so much cash, it is likely to dip its toe into mergers and acquisitions — music to the ears of investment bankers. Again, you can bet that Morgan Stanley and First Boston will expect a seat at the table. And some fat advisory fees.

BUT will Morgan Stanley and First Boston get all or any of this business, given the messy valuations and other embarrassing setbacks throughout the Google I.P.O. process? Or will Google use **Goldman Sachs** or some other bank?

For the past several weeks, there has been finger-pointing among Google's management, the venture capitalists and the bankers about setting I.P.O. expectations too high. Will the bankers be held accountable? Can they? After all, it was Google's founders who wanted to pursue the unorthodox auction and who, by all accounts, have tried to run it their way.

But Morgan Stanley and First Boston still seem to have an advantage. Unlike Goldman Sachs, which railed against the auction concept when they pitched Google during a bake-off earlier this year, Morgan Stanley and First Boston took on the challenge when Google asked them to think outside the box regarding the I.P.O. So with the offering now complete — and so far successful — you can forgive the banks for wanting to press the "I'm feeling lucky" key. □

Business Day

The New York Times

SUNDAY, SEPTEMBER 5, 2004

DEALBOOK

ANDREW ROSS SORKIN

Good Deals for Banks, Both Coming and Going

WHEN **Loews Cineplex Entertainment** was sold this summer to a consortium of investors, the deal seemed pretty standard. A bunch of private equity investors anted up some cash and then borrowed some more from Wall Street banks to pay the $1.5 billion asking price.

But the banks that lent the money, **Citigroup** and **Credit Suisse First Boston**, had another role in the deal: they were paid advisers to the owners of Loews, which had hired them to run the auction.

Call it Wall Street's version of vendor financing — or, potentially, conflict-ridden double dipping.

With so few mergers and acquisitions these days and with fees shrinking for the occasional ones that do come along, bankers have found a new way to milk more cash out of deals. Their pitch goes something like this: "We'll sell your company and make sure it gets sold by lending the buyers the money."

So the bank ends up collecting not only an advisory fee from the seller, but also interest payments from the buyer. On Wall Street, the term for this kind of transaction is "staple financing" because, well, that's what it is: the loan agreement is often literally stapled onto the deal's term sheet. "Financing Made Easy" could be its slogan.

While staple financing is not a new practice, it has become more routine in the past year — not just among the big banks known for lending, like **J. P. Morgan Chase**, but perhaps even more at firms best known for their advisory business, like **Goldman Sachs** and **Morgan Stanley**. So far, no problems have become evident, but it also appears to be a Securities and Exchange Commission inquiry waiting to happen. After all, it is one thing to advise a buyer and lend it money, but quite another entirely to work both sides of the deal.

The conflicts are so rife, where to start? First, there is the question of allegiance. Ostensibly, an investment bank hired to advise the seller represents the best interests of the seller. But the moment the prospective buyer also becomes a client, with its own interests, the interests of both sides are potentially in a position to be compromised.

The problem has become even knottier. In the past, loans were made mostly to private equity groups, but they are now also being extended to big corporations. That is further enticement for banks to cozy up to the buyer, by way of the loan. Once the deal is made, after all, the bank loses the seller as a client. Better to get hitched to the buyer, a possible future client.

The other big potential problem arises when the sell-side adviser has to render a fairness opinion on the deal. If you thought fairness opinions were a joke to begin with, you might end up in a hospital with laughing pains after reading a fairness opinion on a deal where you know both sides are paying the bank.

Wall Street defends staple financing as a

Stuart Goldenberg

smart and important financing option that can give sellers a more robust auction. Typically, the guarantee of financing for buyers means that more companies and private equity firms are likely to bid. Banks have successfully sold sellers on this idea by contending that allowing them to finance the deal reduces the risk that the deal won't be completed. They also like to argue that allowing them to finance the deal speeds up the auction process and keeps it more confidential because bidders don't have to bring in multiple banks to finance the deal.

Some clever sellers also like the idea, because they see an opportunity to reduce the fee they have to pay. Several bankers said privately that sellers had allowed them to offer staple financing only after the bank cut its advisory fee. The sellers argued that the bank would make up the fee by collecting interest from the buyers.

The banks like to say that there is a Chinese wall between the bank employees who manage an auction and those who offer the financing. But in practice, it doesn't always work that way. When the bank, as sales adviser, sends sales books to prospective buyers, the packages often include information about contacting the bank's lending arm. But in reality, who does the buyer really call? The guy whose phone number is on the cover letter, the "advisory" banker.

It is plausible that staple financing, managed properly by ethical and competent people, can be beneficial for both sides. But in the wrong hands — and Wall Street has had its share of those over the years — the practice could turn dangerous. □

Business Day

The New York Times

SUNDAY, SEPTEMBER 19, 2004

DEALBOOK

ANDREW ROSS SORKIN

The MGM Approach: Pay Me First, Sign the Deal Later

THE term "in principle" is usually a bright red flag. So when a consortium of investors led by the **Sony Corporation of America** announced that it had reached a deal *in principle* to acquire **Metro-Goldwyn-Mayer** for nearly $5 billion, it came as no surprise that there were whispers on Wall Street questioning whether the tentative deal would be completed.

But the whisperers may have missed the fine print, including one of the most unusual deal terms in takeover history: MGM said it had "received a security deposit of $150 million" from the consortium, which includes the buyout firms **Providence Equity Partners**, **Texas Pacific Group** and **DLJ Merchant Banking Partners** as well as a partnership with **Comcast**. Sony had the higher bid, but it was the last-minute deposit, structured much like the earnest money that home buyers hand over when making a contract offer, that pushed **Time Warner**, the expected winner, out of the running.

Big corporate mergers often include a break-up fee to compensate the buyer or seller in case the deal falls apart, but it is exceedingly rare for the buyer to make a nonrefundable deposit on a deal that still requires additional due diligence and is more than a week away from

Illustration by The New York Times

official sign-off by all companies' boards.

The security deposit maneuver was even more unusual because the entire cost was borne by Sony. The other investors refused to contribute to the payment, executives close to the negotiations said. (It makes sense that the private equity investors refused to ante up; their agreements with their investors would never allow such a risky move.) So it was left to Sony of America's chairman and chief executive, Howard Stringer, to wire all $150 million to MGM.

If something goes wrong as the consortium and MGM try to sign the deal this week, Sony will be left on the hook. Mr. Stringer's decision may appear especially risky because it leaves him vulnerable to the possibility that his partners could try to "retrade" — that is, renegotiate — the terms of their investment in the deal. And the private equity firms have not exactly been perfect partners with one another, especially Texas Pacific Group, which kept trying to alter the terms of its involvement. The consortium had been bogged down by infighting ever since it made its original bid for MGM in April, opening the field to an offer from Time Warner.

But Mr. Stringer's gamble may be canny. The payment guaranteed that the Sony group would win the auction, and the terms of the deposit give it the equivalent of a nine-month option to buy the company. In fact, the only way it could lose would be if a higher bid for MGM emerged, in which case MGM would have to pay back the $150 million to Sony.

The decision by Mr. Stringer, backed by Robert S. Wiesenthal, Sony's chief financial officer, was made easier by a $4.25 billion loan commitment from **J. P. Morgan Chase** & Company. That enormous loan, negotiated by James B. Lee Jr., vice chairman of J. P. Morgan, and Mr. Stringer at the United States Open last Saturday, was more than the group needed. So even if one of Sony's partners dropped out, it would still have enough financial firepower to close the deal.

The paid-in-advance security deposit was the brainchild of Kirk Kerkorian, MGM's controlling shareholder, and Alex Yemenidjian, MGM's chief executive, who were justifiably nervous that the finicky Sony-led group might try to back out of the deal or change the terms after Time Warner had given up, leaving them with no leverage. MGM had tentatively negotiated a $150 million "business interruption fee" with Time Warner if that deal fell apart, but it was hardly a security deposit. Indeed, according to the executives, MGM never expected the Sony-led group to meet its nonrefundable deposit demand.

But it did. Will other deal makers now have the chutzpah to make — or meet — the same demand? □

Business Day

The New York Times

SUNDAY, NOVEMBER 28, 2004

DEALBOOK

ANDREW ROSS SORKIN

For a Takeover Artist, One Bluff Too Many?

CARL C. ICAHN, the pushy financier, is at it again.

This time Mr. Icahn is playing "chicken" with **Mylan Laboratories**, a maker of generic drugs that is trying to buy a rival, **King Pharmaceuticals**. After failing through personal persuasion to dissuade Mylan from pursuing King, Mr. Icahn decided to play hardball: he made a $5.4 billion bid for Mylan.

Of course, the moment that Mr. Icahn's offer crossed the wire with his trademark comments demeaning the company's board members — he said that if they didn't consider his proposal, it would "constitute a quintessential example of a board abrogating its responsibility" — shares of Mylan soared. Then, right on cue, investors started to question whether the deal with King would be completed or thwarted.

But the real question is why anyone on Wall Street takes Mr. Icahn seriously anymore. He is Wall Street's perennial Boy Who Cried Wolf. Mr. Icahn has a made a fortune — he is estimated to be worth some $7 billion — threatening to take over companies and then rarely going through with the proposition.

About a year ago, he pulled virtually the same stunt he is trying with Mylan on a company called **Visx**, starting a proxy fight and then making a bid. After much vitriolic back-and-forth, he backed down. He got investors in a tizzy another time last year, when he started buying shares of Kodak, with investors speculating that he could start a fight to take control there, too. Again, nothing of consequence ever happened.

Mr. Icahn, who says his offer is serious despite his encouraging Mylan to seek other bids, seems to almost revel in the power he has to move the market by buying up shares or making an offer — which is typically filled with so many conditions that it is impossible to believe that they could ever be met. But once the stock has popped, he's often out the door. And he rarely declares when he is selling — in contrast to occasions when he buys stock and publicly announces his takeover efforts.

It is easy to understand Mr. Icahn's motivation in breaking up the Mylan-King deal. He is "long"

Stuart Goldenberg

shares in Mylan — he bought them right after the deal was announced and the shares had dropped — and stands to make money if Mylan is acquired or if the King deal falls through, in which case Mylan's stock would presumably rise. At the same time, Mr. Icahn is "short" King, meaning that he would profit if that stock dropped, which it would almost undoubtedly do if its acquisition by Mylan fell through.

Mr. Icahn is not the only investor hoping to kill the Mylan-King deal. UBS Global Asset Management, which owns about a 3.6 percent voting stake in Mylan, has also come out against the deal, arguing that it would make Mylan much less profitable, distract management and upset the introduction of Nebivolol, one of its most anticipated new drugs.

What makes this fight with Mr. Icahn particularly interesting is that several big investors are lining up against him with some unusual moves. A bevy of hedge funds, led by Perry Capital and Citadel, which had bought King shares in the hope that the deal with Mylan is completed, have started buying shares of Mylan to help push the deal through. But to protect themselves, some of these investors have begun using sophisticated swap trades with banks so that they have no exposure to Mylan's stock price. This way, the investors have voting power, but no real economic interest in Mylan.

Some big investors are lining up to challenge Carl Icahn.

It is a fairly innovative maneuver that may have important implications for the takeover business, and in this instance will make Mr. Icahn's efforts doubly difficult.

Whatever the outcome, chances are that Mr. Icahn, who didn't return a call seeking comment, will not become the new owner of Mylan. But then again, he probably never wanted it anyway. □