

WHO TO CALL WHEN THE BARBARIANS ARE AT THE GATE

BY RONALD D. OROL AND PAULA SCHAAP

Activist campaigns involve a lot of strategy — legal, financial and investor relations — and the rise in funds dedicated to this kind of value enhancement (from the funds' perspective) or disruption (from the corporate perspective) also means greater need for advisers practiced in the activism playbook. The Deal spoke to some of the best-known names on both sides of the aisle to identify the most sought-after gunslingers for proxy season 2014. If one of these names shows up in a regulatory filing as a recent hire, it's a pretty good indication that something's up.

Lawyers

Wachtell, Lipton, Rosen & Katz

Marty Lipton is the founder of the anti-takeover poison pill mechanism so it's not surprising that the law firm that bears his name tops The Deal's list of legal advisers to companies targeted by activists. The storied law firm is typically involved in dozens of high-profile campaigns annually and 2013 was no exception.

Oil and gas giant Hess Corp. turned to Wachtell when it faced off with Paul Singer's Elliott Management, while Sotheby's is receiving the firm's advice as it tries to deal with Third Point LLC's Dan Loeb, who has mounted a proxy contest at the auction house. Other headlining defensive campaigns included Wausau Paper Corp. against Starboard Value LP, and Forest Laboratories Inc.'s struggle with Carl Icahn through two successive proxy fights and its eventual \$25 billion sale to Actavis plc. Wachtell also worked with Michael Dell against Icahn's push to get more money out of the founder's take private bid for Dell Inc.

Wachtell is noted for coming up with new strategies to defend its corporate clients — the firm advised clients to enact a new kind of bylaw, devised by Wachtell, in response to compensation paid to activist director nominees, something corporates call a "golden leash." And the firm has taken its pitch to Washington with efforts to heighten regulation of proxy advisory firms ISS, which corporations believe is too influen-

tial and conflicted. The law firm is also urging policymakers to expedite the 13D disclosure regime for activists, arguing that speedy disclosure of investor positions promotes transparency and correct pricing in the markets, while, of course, aiding the corporations by allowing them to respond quicker. — Ronald Orol

Skadden, Arps, Slate, Meagher & Flom LLP

Skadden tells embattled corporations targeted by activists when to keep fighting and when to fold their cards and settle. The New York-based firm is another top player representing companies faced with activists in a whole range of high-profile contests. Over the past 12 months Skadden publicly advised more than 10 companies targeted by insurgent investors, as well as many more in behind-the-scenes situations. Recent noteworthy campaigns include advising Commonwealth REIT, which is faced with a consent solicitation to replace the entire board by two dissident investors. On Tuesday, the activist funds announced they had garnered 81% of outstanding shares approving their proposal to remove the REIT's entire board.

The firm also has advised Compuware Corp. in an agreement to end a threatened proxy contest and \$2.3 billion unsolicited bid from dissident Elliott Management. Skadden also worked with Gardner Denver Inc. in response to an investment by ValueAct Capital LLC. Gardner was sold in March 2013 to Kohlberg Kravis Roberts & Co. LP for \$3.9 billion. The firm never represents activist investors but it does offer advice to strategics launching unsolicited takeover bids to take over other companies. Case in point: Skadden advised CF Industries Holdings Inc. in its proxy fight to elect three directors to the board of Terra Industries Inc. as part of the company's 2009-10 ultimately successful effort to acquire Terra. The firm also has a hand in Washington, with top ex-Securities and Exchange Commission staffers on board as partners. These attorneys have a wide role, urging regulators to remove dissident proposals and making recommendations seeking to help companies keep anti-takeover protections and fend off insurgencies. — Ronald Orol

Olshan Frome Wolosky LLP

Steve Wolosky will tell you with a hint of pride in his voice that his New York-based firm is only on the activist side of the shareholder-corporation equation. Not only that, but Wolosky has been in it a long time: he worked with investors behind the scenes when Melvyn Estrin and Abbey Butler went after National Intergroup (formerly National Steel), owner of Fox Meyer Health Corp., in the late 1980s. But his real work with the modern-day form of activism started with Warren Lichtenstein's Steel Partners, for which he has been a longtime adviser.

Still, Wolosky said in a recent interview that things have changed in the world of activism, "It's a much more sophisticated world." Now, investment is more concentrated in the institutional holders, the Blackstone Groups of the world, for example. So as important as any particular proxy contest might be, it's also important that an activist investor be viewed as consistent in its arguments, Wolosky said. "It's much more important to build a record based on how you live up to your word with institutional shareholders — it affects how you are able to go back to them in a future contest."

Proxy season 2014 looks to be even busier for the firm this year than last — a record for the activist practice that Wolosky chairs. The firm has already submitted nomination notices at 21 public companies, including Abercrombie & Fitch Co. on behalf of Engaged Capital LLC; Rentech Inc. for Engaged and Lone Star Value Management LLC; Starboard's campaign at Wausau Paper Corp.; and FrontFour Capital Group LLC at Sensient Technologies Corp. And that doesn't include the six settlement agreements the firm has already negotiated and more, perhaps, to come. While Olshan also makes sure it is part of the policymaker discussion about activism, it takes a more low-key, behind-the-scenes approach than its corporate brethren; something the firm said it believes is ultimately more effective. — Paula Schaap

Schulte Roth & Zabel LLP

Marc Weingarten has been advising activist investors since the corporate raider days of the 1980s. His early high-profile clients included iconic raider Asher Edelman. These days, Weingarten and partner David Rosewater run the firm's activist investor practice, a top go-to law firm for well-known and smaller agitators. High-profile clients include insurgent investors: Jana Partner's Barry Rosenstein (who trained under Edelman), Trian Fund Management's Nelson Peltz and Clinton Group's Greg Taxin. Other activist clients include Elliott, Sandell Asset Management, Casablanca Capital, Orange Capital LLC, Land & Buildings Investment Management and Taconic Capital, and a number of occasional activists including TPG-Axon Capital, First Manhattan and

HealthCor Management.

The firm is advising on more than 20 separate activist campaigns. "We provide a lot of advice on strategy," said Rosewater. "Everything from advice on proxy contests and tactics, including settlement advice, to vetting all the material in their disclosure documents, letters and white papers." The firm analyzes target company bylaws and governance documents to identify what kind of approach an insurgent in the midst of a campaign is permitted to take, whether it is calling a special shareholder meeting, launching a consent solicitation or diving into a traditional short-slate proxy contest. The firm predominantly represents activist investors but it has been known to dabble in representing corporations, such as Equal Energy Ltd.'s 2013 efforts to respond to a dissident campaign by Lawndale Capital Management's Andrew Shapiro. The firm also has a Washington presence; representing their clients on occasion such as when they seek rule-changes that would give investors greater flexibility to pick and choose candidates in proxy contests. — Ronald Orol

Bankers

Houlihan Lokey Inc.

The activist tactic of hiring a bank to conduct an analysis on a target company is one that has grown substantially in recent years and Houlihan Lokey Inc. has become a key beneficiary. The Los Angeles-based boutique investment bank only started advising activist investors in 2012, however, that practice had grown by 2014 to represent almost half of the bank's activist-related business. The other half is the bank's traditional business of advising corporations that are the target of insurgencies. High-profile campaigns include: Orange Capital vs. REIT Charter Hall Group in 2012 and against Strategic Hotels and Resorts Inc. in 2013-14; PSAM objecting to the \$7 billion MetroPCS Communications Inc.-T-Mobile USA Inc. merger in 2013; and now Barington Capital, which this year is opposing Darden Restaurants Inc.'s plans to spin off its Red Lobster brand instead of conducting an overall strategic review.

Activists hire Houlihan to do the kind of analysis needed to back up their assertions about the target company, in order to garner the support of other investors and, sometimes, directors. In the short-term, it also often pushes target companies to hire their own bank to consider strategic alternatives, if they haven't already, a move that typically helps insurgents in their endeavors. Nonetheless, Houlihan said it has no plans to abandon advising companies. It worked with engineering services provider Michael Baker Corp. between 2011 and 2013, as it faced insurgency campaigns from Starboard and Crescendo Partners LP. Michael Baker was ultimately acquired by an affiliate of DC Capital Partners LLC in 2013 for roughly \$400 million. — Ronald Orol

Proxy solicitors

Morrow & Co.

Assisting companies faced with or worried about activists is a large — and growing — part of Morrow & Co.'s annual proxy solicitation and consulting business. The Stamford, Conn.-based firm that typically likes to keep a low profile is a key solicitor and adviser to Commonwealth REIT. Public filings also list it as a proxy solicitor last year for Sotheby's, the auction house in the midst of a proxy contest with Dan Loeb's Third Point.

The 40-year-old firm mostly advises companies behind the scenes about their prospects for resisting an activist approach based upon their knowledge of how the various institutional investors and proxy advisers are likely to react. The firm's name never comes up, for example, in cases where a proxy contest is settled before it is waged. Morrow also advises dozens of companies annually that have not yet been targeted by activists, as part of its activist defense advisory business. Separately, it assists a number of major companies on their governance structures.

The firm is heavily involved in soliciting proxies in major deals that are contested by activists and other disgruntled investors seeking a greater premium. Morrow advised Softbank Corp. and its interests in the Clearwire Corp. and Sprint Corp. transactions. The firm also solicited proxies for TV station operator Belo Corp. which was acquired by Gannett Co. in 2013 for \$2.2 billion and had some investors to deal with, including Pine River Capital Management LP. — Ronald Orol

Okapi Partners

You could say that Okapi Partners CEO and co-founder Bruce Goldfarb's path to proxy solicitation adviser came through

M&A. He started his career as a partner at Cravath, Swaine & Moore LLP, where he got involved with a proxy fight in 1991, when they didn't happen at the rate they do today. He advised Tektronix Inc. (now a unit of Danaher Corp., which bought it in 2007 for \$2.8 billion), when George Soros' Quantum Fund came calling. Though nothing came of Quantum's approach, Goldfarb said that was his introduction to how investors could best communicate with each other.

When Goldfarb left Cravath to go to work as in-house transactional counsel at Scudder Funds, he got to see both ends of proxy engagement: he represented the closed-end mutual funds, which were often under attack by activists, and also was on the proxy committee overseeing Scudder's sale to Zurich Financial Services (later acquired by Deutsche Bank.)

Goldfarb left his next position at Georgeson's proxy solicitation business when it was acquired by Australia's Computer-share Ltd. because he found that the acquirer's size meant it was often conflicted out of representing activists. So he and co-founder Patrick McHugh set up their own shop in 2008, just in time for the financial crisis. Despite the economic chaos that ensued, and mostly because of their independence, Goldfarb said they received requests for their proxy advisory services. Now, times are different.

Okapi has been involved with numerous campaigns and the activist client list is long. Those activists in their client roster with a long track record include Starboard, Clinton, Jana Partners, Relational Investors LLC, FrontFour Capital, Casablanca Capital and Glenview Capital Management LLC, but there are also recently arrived firms such as Orange Capital and North Tide Capital LLC. But the firm also provides services for corporations — in 2010 it advised Denny's Corp. when it faced a group of dissidents hoping to get board seats and where shareholders ultimately declined to vote for the investors' slate. — Paula Schaap

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