

THE RECORDER

133RD YEAR NO. 24

www.callaw.com

THURSDAY, FEBRUARY 5, 2009

An incisivemedia publication

VLG veterans bring \$285 million deal to Cooley

New Year's was nice, but Christmas and Thanksgiving are a blur for **COOLEY GODWARD KRONISH** attorneys who worked around the clock to get a deal solidified between two pharmaceutical companies before an accounting rule affecting mergers changed Jan. 1.

Aliso Viejo's Valeant Pharmaceuticals will pay \$285 million in cash, plus additional undisclosed milestone payments, for privately owned Dow Pharmaceutical Sciences, a dermatology-focused company based in Petaluma.

The rule creating such a rush was the Statement of Financial Accounting Standards 141, which says companies must report royalties and milestone payments at "fair value" in the year of the deal, instead of the year they are paid.

That's posing some difficulties for buyers who aren't sure how to quantify the current fair value of payments that are contingent on the success of a product or program.

If there was going to be a deal, they wanted it signed and closed by the end of the year to avoid the rule change, said partner **Mark Weeks**, who led the transaction for Dow.

Deals

"The overall market and environment is having an impact on all deals, but this company just happened to be in a strong position, where it didn't feel pressured and didn't have to do a deal," Weeks said.

"We started the deal the week before Thanksgiving, and like many deals, we pushed from day one to try to see if we could get a deal in place. In this market, you don't want to sit around to get closure."

Weeks landed at Cooley in October from Heller Ehrman's Venture Law Group, with client Dow in tow. He has worked with Dow since 2003.

Dow earned \$45 million in revenue in 2008, \$20 million of which came from royalties on products it licenses. In October, Dow received approval from the Food and Drug Administration to sell an acne drug called Acanya. Five other products are in the pipeline.

Valeant saw it as an opportunity to boost its dermatology footprint.

Finding the right price for a company can be difficult in this economy. But this deal was an exception, Weeks said, because Dow was a privately owned company in relatively good financial standing.

"The entire environment for valuing companies became very difficult throughout 2008, even before you got to the dramatic falloff we had in the fall. That comes into play in every deal," said **Jennifer Fonner DiNucci**, another partner that worked on the transaction.

"The difficulty is assessing the risk of waiting and the time value of money and where valuations are going to be in the future. It makes for a complex balancing act, and, fortunately, one which we didn't really have to engage in here," she said. "There are many companies that aren't going to be able to weather the storm and come out intact. For those that really do have a choice, it's a difficult



JASON DOY

DOUBLE TEAMING: Mark Weeks brought a team of Venture Law Group attorneys — and a client — from Heller Ehrman, and worked with longtime Cooley veteran Jennifer Fonner DiNucci on a \$285 million deal.

time, because it's hard to know what the right valuation is today."

Valeant will pay Dow \$285 million, subject to certain closing adjustments. About \$8 million in cash will be retained from current Dow accounts, making the net amount paid \$277 million. Valeant will make the first payment of \$250 million upon closing (\$242 million net of cash). In the six months following closing, Valeant will fund an escrow account of \$35 million, which will be subject to indemnification claims from Valeant for a period of 18 months following closing.

Additionally, Valeant will pay future milestones, based predominantly on the achievement of approval and commercial targets for certain pipeline products still in development.

MORGAN, LEWIS & BOCKIUS represented Valeant in the deal.

With Weeks and DiNucci on the deal were Cooley partners **Mark Windfeld-Hansen** and **Renee Deming**, and associates **Hans Riegels**, **Josh Erikson**, **Laura McDaniels** and **Shane Albright**. All but Albright and DiNucci are Heller veterans.

— Amanda Royal