

# Shareholder Sedition

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Facing long odds, shareholder Richard Macary managed to oust the leaders of AVI BioPharma, a struggling biotech firm in Portland, Ore., and replace them with a new slate. Macary's crusade began in 2005 after the New York City investment adviser told wealthy clients, friends and relatives to buy shares of tiny AVI (market cap: \$94 million). The company has spent 18 years and \$241 million of investor money trying to commercialize "antisense" molecules, bits of RNA that prevent cancer cells, viruses and bacteria from expressing certain genes. The technology holds promise, says Macary, but was set back after a long-delayed hepatitis C trial showed no health benefits. As the stock lurched from \$2 to \$8 back to \$2, Macary stepped in.

Is there a whiff of shareholder mutiny in the air? The Rockefellers tried and failed to unseat ExxonMobil's Rex Tillerson. Carl Icahn hasn't yet cleaned out Yahoo's executive suite. Pulling off a putsch is expensive and risks countersuits. "A challenger has to bear the costs," says Harvard Law professor Lucian A. Bebchuk, "but would be able to capture only a limited fraction of the benefits produced for shareholders." One small triumph doesn't make a trend.

Still, Macary, who owned roughly \$200,000 worth of AVI stock, has paved the way for future fights. He remembered that during the s&l scandal attorneys set up trusts on behalf of shareholders, who helped pay for litigation against Uncle Sam. In late 2006 Macary set up a Delaware trust, with himself as trustee, and sent out mailers to AVI shareholders. Ordinarily, that's where the economics of activism would break down: Hiring a proxy firm to contact all 20,000 shareholders would cost \$20,000, plus legal expenses. But Macary had already scared up funds to contact only those who had more than 10,000 shares, directing them to a Web site where they could print trust documents and donate money to fund his campaign.

Internet message boards began to buzz, and in poured a total \$200,000 in increments as small as \$10. Robert Fuentes, an investor and biotech executive, suspected that Macary was fronting for a hedge fund and grilled him on the phone before sending \$125. Macary also dodged the proxy pitfall: Because donors were not asked to sign over their votes, only to pledge their support, the trust did not have to file expensive disclosures with the sec, which are magnets for lawsuits and often reveal an insurgent's supporters and strategy to company managers.

Macary fired off a letter to AVI's board denouncing the company's performance and demanding an audience. At a meeting early last year he told directors that longtime Chief Executive Denis Burger had ruined AVI's credibility by telling investors to expect clinical trials that took place years later, or not at all, and by raising money via dilutive private offerings that roughly doubled company shares. The attack caught Burger off guard. "We were unfamiliar with this approach," he says. He admits he should have managed expectations better but defends the equity sales to raise lifesaving cash. Clinical failures, he explains, simply come with the territory.

Two months after the meeting directors told Burger to step down, replacing him temporarily with a board member and dishing out options to his lieutenants. Months passed without a new chief

executive. When Macary met the chairman last September, his frustration boiled over. He threatened a proxy battle unless AVI put two of his picks on the board. The chairman yielded and gave the seats to MedImmune's former head of cancer trials and an executive who'd run several medical startups. In return Macary dropped his proxy threat and disbanded the trust. In March the board hired a chief: Leslie Hudson, a former executive at Pharmacia and Glaxo.

Would a shareholder advocacy trust work against a bigger target? Probably not, opines Patrick McGurn, a corporate governance expert at RiskMetrics Group. Larger companies could demand disclosure filings to smoke out intentions and find legal means to protect themselves.

AVI's stock is still in the dumps, at \$1.32. Hudson is vague about bringing a drug to market; he has only one phase III trial in the works. Macary is optimistic--thanks to an outside example: In January Isis Pharmaceuticals sold a license on its cholesterol antisense drug to Genzyme, with a potential \$2 billion payout.