

# M&A Alert

May 2012

## Delaware Court of Chancery Enjoins Exchange Offer and Proxy Contest Based Upon Breaches of Confidentiality Agreement

**Chancellor Strine enjoins Martin Marietta's hostile exchange offer for four months and its proxy contest at Vulcan's 2012 annual meeting.**

### Implications for Our Clients

#### Confidentiality Agreements Matter

- While many of the Court's interpretations turned on the specific intentions of the parties to the NDA and JDA at hand, its interpretation of the terms may have broader implications for transactions where the NDA expressly indicates, or a court later establishes, that the disclosing party intends its information for use only in a negotiated context.

#### Review Your NDA Forms

- If the parties intend the shared information for use only in the context of a consensual, negotiated transaction between the parties, they should define the "Transaction" covered by the NDA accordingly.
- If the disclosing party desires to permit "legally required" disclosure by the recipient only when it is the result of an affirmative order of a court or governmental authority (or mandated discovery), the agreement should provide this specifically.
- Similarly, the receiving party may find that its ability to make disclosure otherwise mandated by legal regimes (such as SEC rules) may be constrained by an NDA, particularly in the context of so-called "Discussion Information" concerning the existence of negotiations.
- If the parties intend to allow unsolicited proposals if friendly discussions prove to be unsuccessful, they should consider expressly permitting use of at least Discussion Information to the extent required by law; express permission for use of the same information in investor communications may also be needed.
- If standstill provisions are used, the parties should consider whether to clarify that actions prohibited by the standstill will be permitted where the term of the confidentiality agreement is longer than that of the standstill.
- Care should be taken that, when NDAs and JDAs are used in a transaction process, the terms and covenants in both agreements are common and co-extensive, unless the context mandates otherwise.

### Summary

In the spring of 2010, Martin Marietta Materials, Inc. and Vulcan Materials Company entered into a non-disclosure agreement (NDA) and a joint defense agreement (JDA) in furtherance of discussions towards a potential merger of the two companies. Notably, neither agreement contained customary "standstill" terms.

Both the NDA and the JDA limited the use either party could make of the information exchanged during the due diligence process. The NDA also prohibited the parties from revealing publicly that discussions between the parties had even taken place, except in the event disclosure was legally required, in which case the parties were to jointly consider that disclosure. There were some inconsistencies between the NDA's and JDA's use of terms and confidentiality covenants.

By the spring of 2011, Martin Marietta became more bullish about acquiring Vulcan and began formulating plans for a hostile acquisition of Vulcan. Martin Marietta utilized the same personnel and advisors to conduct both the earlier friendly discussions and the formulation of the hostile offer.

In December 2011, Martin Marietta sent Vulcan a public bear hug letter and launched an exchange offer to acquire Vulcan for 0.5 shares of Martin Marietta stock for each Vulcan share. In disclosure materials filed with the SEC, and also in press releases and other forums, Martin Marietta publicly discussed its prior negotiations with Vulcan.

In support of its exchange offer, Martin Marietta launched a proxy contest seeking to have its slate of candidates elected to Vulcan's board at Vulcan's June 2012 annual meeting.

Even though the NDA and JDA did not include a "standstill" provision explicitly prohibiting a hostile bid, Chancellor Strine nevertheless concluded, after extensive consideration of the parties intentions and dissection of the meaning of commonly used terms, that the agreements prohibited Martin Marietta's hostile exchange offer and the proxy contest for Vulcan's June 2012 annual meeting.

## Discussion

In analyzing whether Martin Marietta breached the NDA and the JDA by using confidential information received from Vulcan in support of a hostile bid, the Court first determined that the language in both contracts was ambiguous. This allowed the Court to look to extrinsic evidence, including the fear expressed by Martin Marietta's CEO in the spring of 2010 that Martin Marietta itself might be subject to a hostile acquisition overture as a result of the exchange of confidential information with Vulcan. The Court noted that this concern motivated Martin Marietta to propose language to tighten the NDA and JDA, but was at odds with the position subsequently taken by Martin Marietta in the litigation. Using that extrinsic evidence, the Court concluded that the NDA and JDA limited Martin Marietta's use of Vulcan's confidential information to a friendly, negotiated transaction between the two companies.

Similarly, the Court held that the NDA and JDA, which Martin Marietta had intended to be extremely limiting, prohibited Martin Marietta from providing a lengthy, one-sided recitation of the parties' negotiation history in disclosures filed with the SEC. As the disclosing party, Martin Marietta bore the burden to show that the disclosure was legally required (both generally and with the specificity used by Martin Marietta), a burden that the Court concluded Martin Marietta failed to satisfy. Of note, the Court declined to consider Vulcan's "colorable" argument that, by promising not to reveal confidential information during the term of the NDA, Martin Marietta was not permitted to voluntarily put itself in a position that could legally require disclosure of its past discussions with Vulcan.

Martin Marietta also argued that, once confidential information had been aired in required disclosures filed with the SEC, the information was no longer confidential and could be used in other ways. The Court rejected this argument, concluding that the NDA and JDA only authorized Martin Marietta to use confidential information as legally required, and that there was no contractual support for the argument that Martin Marietta could make subsequent use of the information in press releases, investor conference calls or communications with journalists.

The NDA and JDA both expressly provided that money damages were an insufficient remedy for any breach and that an aggrieved party was entitled to an injunction and specific performance. Vulcan requested an injunction against Martin Marietta's hostile bid for four months, which roughly corresponded to the period between when Vulcan launched its exchange offer and the expiration of the NDA. After emphasizing that the remedy was based on the contractual provisions of the NDA and JDA — provisions that Martin Marietta had originally wanted in order to protect itself — the Court entered Vulcan's requested injunction.

The Court noted that a longer injunction could have been justified by the "pervasiveness" of Martin Marietta's breaches of the NDA and JDA, and because the JDA did not include an expiration date for the confidentiality provisions contained therein. The injunction, although nominally narrow in scope, has a significant impact on Martin Marietta's ability to continue its pursuit of Vulcan. Because it prevents Martin Marietta from proceeding with its exchange offer, proxy contest and any other step towards acquiring Vulcan or its assets for a period of four months. Moreover, because Vulcan's 2012 annual meeting takes place in June, the injunction has the effect of preventing Martin Marietta from running a competing slate of candidates for Vulcan's board of directors until Vulcan's June 2013 annual meeting.

The Court's willingness to enforce the clearly drafted contractual provision for a specific performance remedy reinforces the strength and utility of contractual specific performance provisions in M&A transactions generally. Transaction parties rely heavily on the availability of specific performance as a negotiated contractual remedy in any number of M&A transactions, and these provisions to our knowledge have not previously been tested in this context before the Delaware courts.

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