

## DELAWARE COURT ENJOINS MARTIN MARIETTA'S UNSOLICITED OFFER FOR VULCAN BASED ON NDA BREACHES

May 8, 2012

To Our Clients and Friends:

In a decision with implications for all M&A participants, Chancellor Strine on Friday enjoined Martin Marietta from pursuing its hostile bid for rival Vulcan Materials.<sup>1</sup> The court held that Martin Marietta violated two non-disclosure agreements by using Vulcan's confidential information in deciding to launch its unsolicited exchange offer, and by disclosing confidential information in its offer, proxy materials and other public and private communications. As a result of the four-month injunction, Martin Marietta will be unable to nominate its slate of directors to Vulcan's board at the June 1, 2012 stockholder meeting.

Martin Marietta has announced that it will appeal the decision.

### BACKGROUND

Vulcan and Martin Marietta are the largest and second-largest domestic players in the aggregates industry. In the spring of 2010, shortly after Ward Nye became CEO of Martin Marietta, Vulcan approached Martin Marietta regarding a possible merger. Vulcan had previously tried to engage Martin Marietta in discussions about a possible transaction, but each time Martin Marietta eventually balked, largely over the question of who would be CEO. In 2010, however, with Nye, according to the court, having good reason to believe that he would likely become CEO of the combined company, both parties seemed interested in pursuing a transaction.

Nye made clear, however, that absolute confidentiality was of paramount importance, to protect Martin Marietta against being put "in play." Vulcan agreed, and in May 2010, the parties signed a non-disclosure agreement ("NDA"). Although the NDA did not include a standstill provision, Martin Marietta's general counsel successfully negotiated for strict non-disclosure language and limits on the use of confidential information. The parties also signed a joint defense agreement ("JDA"), which contained its own confidentiality provisions.

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<sup>1</sup> *Martin Marietta Materials, Inc. v. Vulcan Materials Company, Civil Action No. 7102-CS (May 4, 2012).*

According to the court, Martin Marietta became more confident about the benefits of a merger as a result of information provided by Vulcan under the NDA and concluded that it could realize significantly more synergies than it had previously thought. However, by the spring of 2011, Vulcan's stock price had declined relative to Martin Marietta's, and Vulcan lost interest in a merger that it felt undervalued its business.

Between June and December 2011, Martin Marietta considered alternatives to a friendly deal with Vulcan. There was evidence that Martin Marietta and its advisors questioned whether Martin Marietta could launch a hostile bid without violating the NDA requirement that confidential information be used "solely for the purpose of evaluating" a possible business combination transaction between Martin Marietta and Vulcan. On December 12, 2011, Martin Marietta launched an unsolicited exchange offer for all of Vulcan's shares and commenced a proxy contest, seeking to elect four members to Vulcan's classified board at Vulcan's annual meeting scheduled for June 1, 2012.

In connection with its bid, Martin Marietta brought an action for a declaratory judgment that it had not violated the NDA or the JDA. Vulcan asserted otherwise, arguing that Martin Marietta had improperly (1) used confidential information in deciding to launch and formulating its hostile offer and (2) disclosed confidential information—including the fact that negotiations had taken place between the parties and certain terms of those negotiations—not only in its SEC filings but also to investors and the media.

#### THE COURT'S ANALYSIS

The court's analysis began with a comprehensive parsing of the contractual language in the NDA. But, because Chancellor Strine found that the contractual language was not unambiguous, he also conducted a thorough examination of the relevant extrinsic evidence, including the negotiating history, evidence evincing Martin Marietta's motivations and the disclosure in Martin Marietta's SEC filings, which the court described as a "propaganda piece" informed principally by the company's public relations advisors.

The Chancellor had no difficulty concluding that Martin Marietta "used" confidential information in deciding to move forward with its hostile bid—in particular, information that helped form its view as to potential synergies. The question was whether that use violated the NDA because it was not in connection with the evaluation of a *negotiated* transaction. While the word "negotiated" did not appear in the NDA, the court concluded that the parties intended the NDA to allow each party to use confidential information only in connection with a consensual transaction, relying in particular on the fact that Martin Marietta had tightened the language of

the NDA when it thought that it was the party more likely to become the subject of an unsolicited offer.

The court then analyzed whether Martin Marietta violated the NDA by disclosing confidential information in its SEC filings. Martin Marietta argued that the NDA permitted it to disclose confidential information if “legally required” to do so and the SEC rules required such disclosure. But the court ruled that Martin Marietta could not voluntarily launch a hostile offer and then claim that it was legally required to reveal confidential information. The court read the “legally required” exception in the NDA to apply only to requirements arising out of judicial, administrative or other legal proceedings, not securities laws or stock exchange rules. Moreover, even if Martin Marietta could rely on the “legally required” exception, its SEC filings went far beyond what was required under the SEC rules.

To remedy Martin Marietta’s breaches of the NDA, Chancellor Strine enjoined Martin Marietta from pursuing its hostile bid for the four months Vulcan requested, while noting that “an argument can be made that a longer injunction would be justified by the pervasiveness of Martin Marietta’s breaches.” Although Martin Marietta can launch a hostile bid after the expiration of the injunction, the injunction does eliminate one effective means of applying pressure to Vulcan’s board—namely, seeking to elect directors at Vulcan’s June 1 annual meeting.

#### LESSONS FOR STANDSTILLS

While the specific facts and circumstances of this case provide some guidance on what terms a party may want to include in or exclude from a confidentiality agreement, the most important takeaway is that parties are taking a potentially significant risk if their agreements do not clearly say what the parties mean. As Chancellor Strine wrote, “It is for the parties who enter into them to be clear about their terms, and for a party unwilling to honor a contractual promise to not make it in the first place.” Parties to NDAs have often been willing to live with some ambiguity about whether confidentiality or limited use provisions have effects tantamount to a standstill agreement, for instance by prohibiting disclosure of information that would be required in offer documents under SEC rules. However, if a court finds the parties’ agreement is not clear, it will consider all available evidence of the parties’ intentions in deciding how to interpret the ambiguous language. That process may be time-consuming (this decision was issued almost five months after Martin Marietta sought a declaratory judgment) and, at least in Delaware, the court will not hesitate to enforce the interpretation it believes reflects the parties’ intention, even if it results in the drastic remedy of preventing a would-be acquirer from proceeding with a hostile offer.

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