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## Delaware Chancery Court Temporarily Enjoins Hostile Offer Based on Multiple Breaches of Confidentiality Agreements

**In a recent decision, *Martin Marietta Materials, Inc. v. Vulcan Materials Company*, Chancellor Strine of the Delaware Chancery Court temporarily enjoined the hostile exchange offer and proxy contest of a would-be acquiror based on its multiple breaches of two confidentiality agreements it had entered into with the target company. The Court held that although the confidentiality agreements did not contain explicit standstill provisions, the acquiror's impermissible use and disclosure of confidential information warranted a temporary injunction with respect to the exchange offer and proxy contest.**

### Background

The case arose out of the proposed hostile acquisition of Vulcan Materials Company ("Vulcan") by Martin Marietta Materials, Inc. ("Martin Marietta"). In the spring of 2010, the CEOs of Vulcan and Martin Marietta agreed to discuss a potential combination of their companies. In connection with these discussions, Vulcan and Martin Marietta entered into two confidentiality agreements, one with respect to the possible transaction generally (the "NDA") and, later, a common interest, joint defense and confidentiality agreement (the "JDA") with respect to the evaluation of antitrust matters. The NDA prohibited the parties from using the confidential information except in connection with the evaluation of a "business combination transaction ... between" the parties and the JDA prohibited the parties from using the confidential information except to complete the transaction "being discussed" by the parties. In addition, the NDA prohibited the parties from disclosing the confidential information, that negotiations had been or were taking place, or that the NDA had been entered into, subject to certain exceptions where disclosure is legally required and then only after compliance with a "notice and vetting" process. Neither the NDA nor the JDA contained a standstill provision.

By the spring of 2011, the two companies' relative market values began to favor Martin Marietta, and Vulcan cooled on the idea of the transaction. Martin Marietta, which was even more in favor of a deal but could not get Vulcan to reengage, launched an unsolicited exchange offer in December 2011 to acquire control of Vulcan, and also launched a proxy contest to elect four directors to Vulcan's board at its June 2012 annual meeting. As part of its hostile bid, Martin Marietta disclosed confidential information subject to the NDA and JDA in its securities filings and in communications with the press and investors, and it filed suit in Delaware Chancery Court seeking a declaration that nothing in the NDA or the JDA prohibited its exchange offer or proxy contest. Vulcan counterclaimed for a determination that Martin Marietta breached its

contractual obligations by improperly using and publicly disclosing information in aid of its hostile bid and sought a temporary injunction stopping the bid.

## Analysis

Vulcan claimed, among other things, that Martin Marietta breached the NDA and JDA in the following ways: (1) Martin Marietta used confidential information subject to the NDA and JDA to help launch its hostile bid to take control of Vulcan, which would not have constituted a business combination transaction between the companies or the transaction they had discussed; (2) even if Martin Marietta were permitted to use the confidential information to launch a hostile offer, the NDA prohibited disclosure of any confidential information unless the disclosure is legally required, an exception that was not available to Martin Marietta in connection with its exchange offer and proxy contest; and (3) even if the exception for legally required disclosure were available to Martin Marietta in connection with its exchange offer and proxy contest, its disclosures were much broader than the minimum legal requirement and it did not follow the required notice and vetting process.

As a threshold matter, the Court analyzed the information made available to Martin Marietta under the NDA and JDA and concluded that it had plainly used confidential information received from Vulcan to further its exchange offer and proxy contest. For instance, the Court found that Martin Marietta increased its synergies estimate directly as a result of the information it learned from a meeting with Vulcan, which gave Martin Marietta a basis to offer Vulcan's stockholders a premium in the exchange offer while also justifying the deal to Martin Marietta's stockholders as one that would produce higher profits. The Court also noted that Martin Marietta made no attempt when formulating its hostile bid to use a "clean team" of officers and advisors who were unfamiliar with the confidential information received from Vulcan.

The Court then devoted a significant portion of the opinion to parsing the phrase "business combination transaction between" the parties to determine whether it encompasses a hostile transaction. After determining that the language on its face is ambiguous, the Court looked to extrinsic evidence to determine the parties' intended meaning of the phrase. Chancellor Strine noted that both parties, and Martin Marietta in particular, were interested in sharing information only to consider a consensual, contractual business combination that would be approved by their sitting boards of directors. The Court determined that Vulcan's position that the parties never intended to provide information to one another in order to facilitate a hostile bid was consistent with the parties' original intent, and thus concluded that Martin Marietta breached the agreements by using confidential information subject to the NDA and JDA in furtherance of its hostile exchange offer and proxy contest.

In connection with its evaluation of Vulcan's second claim, the Court examined Martin Marietta's position that the securities laws disclosure requirements applicable to exchange offers and proxy contests allowed it to take advantage of the exception under the NDA for disclosures that are "legally required." After parsing the language of the applicable sections of the NDA and reviewing extrinsic evidence, the Court concluded that the legal requirements the parties had in mind when they entered into the NDA were "oral questions, interrogatories, requests for information or documents in legal proceedings, subpoena, civil investigative demand or other process." That is, the parties envisaged an exception to the prohibition on disclosure of confidential information only in circumstances where a third party made an affirmative demand for disclosure. The Court concluded that once the parties reached this affirmative agreement, neither was permitted to avail itself of the exception by voluntarily subjecting itself to disclosure obligations such as those under the securities laws applicable to exchange offers and proxy contests. In addition, the Court noted that even if the exception had been available to Martin Marietta, Martin Marietta conceded that it "blew through" the "notice and vetting" requirements under the NDA and JDA that would have given Vulcan notice of the potential disclosures and an opportunity to seek to prevent or limit the disclosures.

Finally, the Court found that the disclosures Martin Marietta made in its securities filings significantly exceeded the minimum requirements under the securities laws applicable to the exchange offer. In reaching this conclusion, the Court noted that Martin Marietta selectively presented one-sided disclosures that attempted to cast Vulcan's management in a bad light while not disclosing any information that would portray Martin Marietta in the same fashion.

Chancellor Strine noted that the NDA and JDA provided for specific performance and injunctive relief. On balance, the Court found that Delaware's "pro-contractarian" public policy weighed in favor of honoring the parties' bargained-for exchange, and Martin Marietta was enjoined for four months from proceeding with its exchange offer or proxy contest or taking any other steps to acquire control of Vulcan's shares or assets. Martin Marietta has announced that it plans to appeal the Court's decision.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this publication, you may contact your regular Shearman & Sterling contact person or any of the following:

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