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Delaware Court of Chancery Enjoins Unsolicited Offer For Violation of Confidentiality Agreement

In *Martin Marietta Materials, Inc.* v. *Vulcan Materials Company*, the Delaware Court of Chancery enjoined Martin Marietta from continuing its unsolicited exchange offer for, and proxy contest against, Vulcan for four months because Martin Marietta violated its confidentiality agreement with Vulcan. This confidentiality agreement was entered into at a time when the two parties were focused on a potential friendly merger. When discussions failed, however, and Martin Marietta decided to make a public, unsolicited exchange offer for Vulcan, the confidential information obtained pursuant to the confidentiality agreement, including the amount of anticipated synergies, became central to the conduct of Martin Marietta's campaign. While the decision by Chancellor Strine ultimately turned on well-established principles of contract interpretation, the decision underscores the subtle ways that confidentiality agreements can impose standstill obligations even absent express standstill provisions.

When the parties first began to consider a merger, Martin Marietta was apparently more focused than Vulcan on maintaining the confidentiality of information. Martin Marietta's CEO feared that if confidential information – including the fact of the discussions between the parties – leaked into the marketplace, Martin Marietta might become the target of unsolicited offers. With that concern in mind, Martin Marietta proposed a form of confidentiality agreement that limited the circumstances under which information could be disclosed, and Vulcan agreed to such restrictions. The agreement, however, did not contain any express standstill provisions prohibiting an unsolicited offer. Over the course of the parties' discussions, Vulcan's stock price declined while Martin Marietta's rose. As such, while the parties had originally contemplated a merger of equals, the change in circumstances meant that Martin Marietta could undertake the transaction as the clear buyer and began to pursue Vulcan more aggressively. When negotiations failed, Martin Marietta took its bid public by proposing an exchange offer to Vulcan stockholders.

The key provision at issue in the confidentiality agreement required that the parties would use confidential information solely for the purpose of evaluating a transaction "between" Martin Marietta and Vulcan. The court found that this sentence was ambiguous. On its face, it could mean that the information could be used for any deal—unsolicited or negotiated—between the parties, as Martin Marietta argued, or it could mean that the information could be used only for a reciprocal, negotiated deal between the parties, as Vulcan argued. Because of the possible ambiguity in interpretation, the court further examined, among other things, the definitions of "between" as used by laymen and deal practitioners alike, and the fact that the parties' negotiations at the time of the execution of the confidentiality agreement contemplated only a friendly, negotiated deal. Ultimately, the court agreed with Vulcan's interpretation. As such, Martin Marietta could not use the confidential information for its bid.

A second key aspect of the dispute concerned whether Martin Marietta was legally required to make the public disclosures it made. When Martin Marietta launched its exchange offer and proxy contest, it was required to make certain public disclosures of confidential information under federal securities laws. Martin Marietta argued that these disclosure requirements excused the public disclosure, as provided in the confidentiality agreement. The court disagreed and held that Martin Marietta disclosed more than was legally required in its securities filings and further breached the agreement when it subsequently disclosed the same information to investors and the media.

As a remedy, the Court of Chancery enjoined Martin Marietta from continuing its bid for a period of four months. The length of the injunction was tied to the length of time that Martin Marietta was in violation of its confidentiality obligations. The practical effect of the injunction is that Martin Marietta will not be permitted to run a proxy contest to elect directors at Vulcan's annual meeting in June and must wait an additional year before it may do so.

The key takeaway from the decision is that prospective deal parties must be vigilant in drafting and considering the practical effect of confidentiality agreements. While the agreement between Martin Marietta and Vulcan did not contain an explicit standstill provision, Chancellor Strine makes clear in his decision that confidentiality agreements will be strictly enforced in Delaware and, as such, contractual limitations on use and disclosure of confidential information may function as a backdoor standstill agreement.

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