

Martin Marietta Materials, Inc. v. Vulcan Materials Co.: Delaware Supreme Court Affirms Decision to Delay Hostile Bid Due to Breaches of Confidentiality Agreements

On May 31, 2012, the Delaware Supreme Court entered an order affirming the May 4, 2012 decision of the Delaware Court of Chancery to temporarily enjoin Martin Marietta Materials, Inc. from pursuing a hostile bid against Vulcan Materials Co. due to its use of confidential information in launching its hostile bid and its disclosure of confidential information in public filings and communications with the press and investors, all in breach of two confidentiality agreements between the parties. On July 10, 2012, the Delaware Supreme Court issued a formal opinion explaining its decision.¹ Notably, unlike the Court of Chancery, the Supreme Court based its decision entirely on the textual provisions of the confidentiality agreements at issue and did not resort to extrinsic evidence.

I. Factual Background and Procedural History

Prior to engaging in negotiations regarding a possible friendly merger, Martin Marietta and Vulcan, the nation's two largest producers of construction aggregates, signed two confidentiality agreements. The parties' non-disclosure agreement ("NDA") prohibited the "use" and the "disclosure" of "Evaluation Information" (defined as "any nonpublic information furnished or communicated by the disclosing party" and analyses and reports generated from such nonpublic information), except where expressly allowed.² The NDA permitted use of the other party's Evaluation Material "solely for the purpose of evaluating a Transaction" (defined as "a possible business combination transaction" between the parties or their subsidiaries).³ Paragraph 3 of the NDA prohibited disclosure of the merger negotiations between Martin Marietta and Vulcan (or any facts related thereto) except where "legally required," and Paragraph 4 established a "Notice and Vetting Process for disclosing Evaluation Material and Transaction Information" when a disclosure is "legally required" due to an external demand.⁴

The common interest, joint defense and confidentiality agreement ("JDA") entered into by Martin Marietta and Vulcan prohibited disclosure of "Confidential Materials" without "the consent of all Parties who may be entitled to claim any privilege or confidential status with respect to such materials."⁵ It further required that "Confidential Materials" be used "solely for purposes of pursuing and completing *the Transaction*" (defined as "a *potential transaction being discussed* by Vulcan and Martin [Marietta] . . . involving the combination or acquisition of all or certain of their assets or stock").⁶ Neither the NDA nor the JDA had a standstill provision, which explicitly would have prevented either party from making an unsolicited tender or exchange offer.

¹ See *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, No. 254, 2012 (Del. July 10, 2012). See also *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, Civil Action No. 7102-CS (Del. Ch. May 4, 2012); Memorandum of Cahill Gordon & Reindel LLP, *Martin Marietta Materials, Inc. v. Vulcan Materials Co.: Delaware Chancery Court Delays Hostile Bid Due to Breaches of Confidentiality Agreements* (May 22, 2012), available at http://www.cahill.com/news/memoranda/1012955/_res/id=sa_File1/CGR%20Memo%20-%20Delaware%20Chancery%20Court%20Delays%20Hostile%20Bid%20Due%20to%20Breaches%20of%20Confidentiality%20Agreements%20.pdf.

² *Martin Marietta Materials, Inc. v. Vulcan Materials Co.* (Del. July 10, 2012) at 6.

³ *Id.* at 6-7.

⁴ *Id.* at 7-8 (quoting *Martin Marietta Materials, Inc. v. Vulcan Materials Co.* (Del Ch. May 4, 2012) at 8).

⁵ *Id.* at 9-10.

⁶ *Id.* at 10 (emphasis and ellipses in original).

When the merger discussions between Martin Marietta and Vulcan broke down, Martin Marietta used and disclosed Vulcan’s nonpublic information to prepare its exchange offer and proxy contest (collectively, “hostile bid”). Martin Marietta also disclosed Vulcan’s nonpublic information (constituting “Evaluation Material” and “Confidential Materials” under the confidentiality agreements) to third party advisors (*e.g.*, investment bankers, lawyers, and public relations advisors) and to the public and did so without Vulcan’s consent and without adhering to the NDA’s Notice and Vetting Process.

On the day it launched its hostile bid, Martin Marietta filed an action in the Delaware Court of Chancery, seeking a declaratory judgment that its exchange offer and proxy contest were not barred by the confidentiality agreements. Vulcan counterclaimed for a determination that Martin Marietta breached the confidentiality agreements and sought an injunction prohibiting Martin Marietta from proceeding with its hostile bid. Following a trial and post-trial oral argument, the Court of Chancery issued a lengthy decision, determining, upon in depth analysis of the text of both agreements as well as extrinsic evidence where it deemed the contracts’ provisions ambiguous, that Martin Marietta had used and disclosed Evaluation Material and Confidential Materials in breach of the NDA and JDA, respectively. The court, therefore, enjoined Martin Marietta from proceeding with its exchange offer and proxy contest for four months. Martin Marietta appealed the decision to the Delaware Supreme Court, which ordered that the case proceed on an expedited basis.

II. The Decision of the Delaware Supreme Court

On appeal, Martin Marietta claimed that the trial court erred in its determinations that Martin Marietta breached the NDA and the JDA and that it “erred by improperly balancing the equities and granting injunctive relief without proof of actual injury.”⁷ The court reviewed *de novo* the claims of error pertaining to contract interpretation and reviewed for abuse of discretion Martin Marietta’s challenge to the grant of injunctive relief.

Before turning to Martin Marietta’s specific claims of error, the Delaware Supreme Court addressed Martin Marietta’s “side assertion” pervading all of its claims, namely that “the Court of Chancery ‘stealthily’ converted” the confidentiality agreements “into a standstill agreement.”⁸ The Delaware Supreme Court opined that “[b]esides being factually incorrect, this argument is irrelevant to, and distracts from, a proper analysis of the contractual issues genuinely presented.”⁹ The court acknowledged that “[s]tandstill agreements and confidentiality agreements are qualitatively different”: standstill agreements explicitly prohibit specific conduct by one contracting party aimed at acquiring control of the other contracting party and do not require or depend on a contracting party’s use or disclosure of the other party’s nonpublic information, whereas confidentiality agreements are meant “to prevent a contracting party from using and disclosing the other party’s confidential, nonpublic information except as permitted by the agreement.”¹⁰ The court stated that it is undisputed that the NDA and JDA are confidentiality agreements rather than standstill agreements, as they did not prohibit Martin Marietta from making a hostile bid for Vulcan; they did, however, preclude Martin Marietta from using and disclosing Vulcan’s confidential information except as expressly permitted by the agreements. The court explained that it is clear that the Court of Chancery understood the distinction between the two types of agreements and did not transform the confidentiality agreements into a standstill agreement.

The court then turned to Martin Marietta’s specific claims of error.

⁷ *Id.* at 19.

⁸ *Id.* at 21.

⁹ *Id.*

¹⁰ *Id.* at 22-23.

A. Martin Marietta's Violations of the NDA

Martin Marietta contested the Court of Chancery's determination that it had violated the disclosure restrictions of the NDA, asserting that the disclosures it made were permitted by Paragraph 3 of the NDA. Martin Marietta claimed its disclosures of Vulcan's confidential information were "legally required" by SEC rules and that, at the same time, Martin Marietta was not required to follow the NDA's Notice and Vetting Process because the disclosures were not made in response to an external demand arising in the course of a legal proceeding.

The Court of Chancery found Paragraphs 3 and 4 of the NDA to be ambiguous and thus considered extrinsic evidence, based on which it determined that Paragraph 3 did not allow a party to the agreement to make legally required disclosures unless the disclosures were made pursuant to an external demand. In the alternative, the lower court held that "Paragraph 3, viewed alone, *unambiguously* did *not* permit the disclosure of one specifically defined information category – 'Evaluation Material' – even if disclosure were otherwise 'legally required.'"¹¹ Without reaching or deciding the merits of the Chancery Court's "ambiguity-based analysis," the Delaware Supreme Court upheld the lower court's decision based on its alternative holding.¹² The Supreme Court explained that the "legally required" exception in Paragraph 3 of the NDA did not cover Evaluation Material; rather, the permitted disclosure of Evaluation Material was the explicit subject of the exception carved out in Paragraph 4, which required that the Evaluation Material be the subject of an external demand and that the party contemplating disclosure give notice of the intended disclosure and engage in a vetting process (where applicable). Thus, the NDA unambiguously permitted a party to the NDA to disclose "legally required" Evaluation Material only pursuant to an external demand and only after following the Notice and Vetting Process. Because the Chancery Court found that Martin Marietta did not disclose the Evaluation Material pursuant to an external demand and did not follow the Notice and Vetting Process, the Supreme Court upheld the determination that Martin Marietta breached the NDA's disclosure restrictions.

B. Martin Marietta's Violations of the JDA

Martin Marietta also challenged the Chancery Court's findings that by using and disclosing Vulcan's Confidential Materials to make a hostile bid, Martin Marietta violated the JDA, which prohibited the use of "Confidential Materials" except "for purposes of pursuing and completing the Transaction," and that the only transaction being discussed by the parties was a negotiated merger. Martin Marietta advanced three arguments in support of its position: (1) the only transaction "being discussed" when the parties entered into the JDA was not a negotiated merger; (2) even if "Transaction" referred to a negotiated transaction, the JDA allowed the use of nonpublic information "for purposes of *pursuing and completing* the Transaction," and Martin Marietta's hostile bid would ultimately facilitate a negotiated transaction; and (3) the JDA is "subservient" to the NDA.¹³

Categorizing Martin Marietta's first assertion as a mixed question of law and fact, the Delaware Supreme Court explained that a challenged factual component will only be overturned if it is found to be "clearly wrong."¹⁴ In this case, the lower court's finding that the only transaction being discussed was a negotiated merger was not "clearly wrong"; on the contrary, it was adequately supported by the evidence. The court held that Martin Marietta's second argument similarly fails because the Court of Chancery found as fact, based on the evidence, that the only transaction being discussed was friendly and excluded a hostile takeover bid. Martin Marietta's third

¹¹ *Id.* at 31 (emphasis in original).

¹² *Id.*

¹³ *Id.* at 25 (emphasis in original).

¹⁴ *Id.* at 26.

argument, based solely on a provision in the JDA that none of that agreement’s provisions “shall affect or limit any other confidentiality agreements, or rights or obligations created thereunder, between the Parties in connection with the Transaction,” amounted to a claim that the JDA created “no restrictions independent of those already imposed by the NDA.”¹⁵ Like the Court of Chancery, the Delaware Supreme Court was unpersuaded by this argument, noting that Martin Marietta’s reading of this provision would “generate the opposite result, namely, that the rights and obligations created in the NDA would specify and limit when Vulcan and Martin could use and disclose Confidential Materials protected by the JDA.”¹⁶ Further, explained the court, Martin Marietta’s interpretation of the provision would “reduce the JDA to a nullity” and would violate the rule that a court must give effect to all contractual provisions, where possible.¹⁷ The Supreme Court agreed with the Chancery Court’s interpretation that the JDA unambiguously required Martin Marietta to obtain Vulcan’s approval before disclosing its Confidential Materials and thus upheld the lower court’s conclusion that Martin Marietta violated the JDA.

C. The Grant of Injunctive Relief

Martin Marietta claimed that the Court of Chancery erroneously granted injunctive relief to Vulcan without any evidence of actual irreparable injury to Vulcan. Reviewing this claim for abuse of discretion, the court held that this claim “fails both legally and factually.”¹⁸ From a legal perspective, the court reasoned, the claim fails because (as the Court of Chancery noted) the parties stipulated in both the NDA and JDA that injunctive relief would be available in the event of a breach of the agreement, and there is no reason not to give effect to these stipulations. Martin Marietta’s argument fails factually as well, since the Court of Chancery made a finding of actual and irreparable injury as a result of Martin Marietta’s contractually impermissible selective disclosure Vulcan’s nonpublic information, based on ample evidence.

Because the four-month injunction precluded Martin Marietta from disclosing Vulcan confidential information to support a proxy contest at Vulcan’s annual meeting (held in June), Martin Marietta also asserted that the scope of the injunction was unreasonable because it had the practical effect of delaying Martin Marietta’s proxy contest by one year. The court held that the Chancery Court properly balanced the equities in favor of Vulcan and that four months constituted “‘a responsible period’ reflecting the time interval between when Martin launched its Exchange Offer on December 12, 2011, and the NDA’s May 3, 2012 expiration date.”¹⁹ The court explained that the fact that this relief “also resulted in delaying Martin for a longer period from seeking to replace the Vulcan board, does not detract from the propriety of the relief the court granted.”²⁰

III. Significance of the Decision

The decision of the Delaware Supreme Court clarifies that even where a confidentiality agreement does not contain an express standstill provision, a contractual provision restricting disclosures of confidential information may create a de facto standstill restriction if the subject of the confidentiality provision is information that would need to be disclosed in the event one of the parties decided to pursue an unsolicited offer for the other.

¹⁵ *Id.* at 27.

¹⁶ *Id.* at 28.

¹⁷ *Id.* (internal quotations omitted).

¹⁸ *Id.* at 39.

¹⁹ *Id.* at 42 (quoting *Martin Marietta Materials, Inc. v. Vulcan Materials Co.* (Del Ch. May 4, 2012)).

²⁰ *Id.*

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Yafit Cohn at 212.701.3089 or ycohn@cahill.com.

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