

## Corporate Securities Law

May 9, 2012

### Stuck in “Between”: Delaware Court Stops Bid Due to Breach of Confidentiality Agreements

On May 4, Chancellor Strine of the Delaware Court of Chancery stopped a hostile exchange offer by Martin Marietta Materials, Inc. for Vulcan Materials Company, and a related proxy process, after finding that in making the offer Martin Marietta breached the terms of two confidentiality agreements between the two parties. In a judgment highly reminiscent of the Ontario Superior Court of Justice’s well known *RIM v. Certicom* decision, Strine concluded that the agreement – which did not include a separate “standstill” provision – precluded Martin Marietta from using Vulcan’s confidential information to pursue the offer and the proxy process because those transactions were not – as one of the agreements required – business combinations between the parties. As in *Certicom*, the court looked past the absence of an explicit standstill provision in the confidentiality agreements to enjoin unsolicited control transaction proposals because of the way the agreements restricted the bidder’s use of confidential information. The decision reinforces the key lesson of *Certicom* that parties considering entering into a confidentiality agreement should consider very carefully the specific terms of the agreement and the possible limitations it may impose upon future activities if the initiative for which the agreement is entered into does not materialize.

#### Background

Martin Marietta and Vulcan are the two largest aggregates companies in the United States, and for a number of years had considered the possibility of a merger. In 2010, the two companies began discussing a potential transaction in earnest and entered into mutual confidentiality agreements to facilitate those discussions and the exchange of confidential information.

Among other things, the confidentiality agreements provided that the parties would use each other’s confidential information “solely for the purposes of evaluating a Transaction” and defined “Transaction” as “a possible business combination between [Martin Marietta] and [Vulcan]”. The parties proceeded to exchange confidential information, which allowed Martin Marietta to identify a number of potential synergies it believed would flow from a combination of the two companies, making a transaction more accretive than it had initially expected.

Vulcan eventually decided that it was not interested in pursuing a transaction and ended the negotiations. Shortly after that, Martin Marietta made a hostile exchange offer for Vulcan, and Vulcan immediately sought an injunction against the offer on the basis that Martin Marietta had breached the confidentiality agreements by (i) using Vulcan’s confidential information to evaluate and make the offer, and (ii) disclosing Vulcan’s confidential information as part of the offer, both in its exchange offer registration statement and in other public documents and statements.

#### The Decision

Chancellor Strine found that the evidence was clear that Martin Marietta had used Vulcan’s confidential information to evaluate the offer, particularly with respect to synergies, and there was no dispute that in the course of the offer Martin Marietta had disclosed information that was protected by the confidentiality agreements. The focus of the decision was therefore whether Martin Marietta’s actions were otherwise permitted under the agreements.

Martin Marietta argued that it was entitled to use Vulcan’s confidential information in connection with the hostile bid because the exchange offer contemplated a combination of Martin Marietta and Vulcan, which would be a business combination between those two companies. Martin Marietta also pointed to the absence of a standstill as evidence that the parties did not intend the confidentiality agreements to preclude unsolicited transactions. In contrast, Vulcan interpreted “between” as encompassing only consensual transactions. After considering the evidence as to what the parties intended when they used that word, Chancellor

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Strine adopted Vulcan's interpretation. In doing so, Chancellor Strine noted that in *Certicom* the Ontario court had similarly concluded that a business combination "between" two parties would not include a hostile take-over bid. (An analysis of the *Certicom* decision can be found in our January 23, 2009 client update entitled "***Implications of the Certicom Decision for Confidentiality Agreements***".)

With respect to its disclosure of Vulcan's confidential information, Martin Marietta argued that this disclosure was required under SEC rules in connection with an exchange offer; therefore, the provisions of the confidentiality agreements that permitted disclosure when "legally required" applied. Strine rejected this argument on the basis that the disclosure obligation was not imposed by an "external demand" but rather as a consequence of Martin Marietta's own decision to launch the exchange offer.

Having concluded that Martin Marietta breached the confidentiality agreements, Chancellor Strine readily accepted that an injunction was an appropriate remedy, particularly since specific performance was explicitly

contemplated by the agreements. He ordered that the exchange offer be enjoined for four months, being the remaining term of the confidentiality agreements at the time Martin Marietta launched the hostile bid.

## Conclusion

Martin Marietta reinforces the lessons of *Certicom* on the importance of clear and careful drafting in confidentiality agreements, particularly when it comes to describing restrictions on the use of confidential information and exceptions to those restrictions, and the potential operation of confidentiality provisions as effective "standstills". With prominent recent decisions in both Ontario and Delaware confirming that courts will not hesitate to enjoin a hostile bid that improperly uses or discloses the target's confidential information, potential bidders should not assume that the absence of an express standstill is sufficient to afford them tactical flexibility if a consensual transaction is not pursued.

Please contact any member of the Goodmans Corporate Securities Group to discuss this decision.