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July 2012

Corporate & Securities Bulletin

MARTIN MARIETTA MATERIALS, INC. V. VULCAN MATERIALS COMPANY: DELAWARE COURT OF CHANCERY HOLDS THAT USE OF CONFIDENTIAL INFORMATION IN HOSTILE BID BREACHES CONFIDENTIALITY AGREEMENTS

Overview

On May 4, 2012, the Delaware Court of Chancery in *Martin Marietta Materials, Inc. v. Vulcan Materials Company*, No. 7102-CS (Del. Ch. May 4, 2012), held that Marietta breached two confidentiality agreements by using confidential information acquired by it during merger negotiations with Vulcan to initiate a hostile bid and proxy contest against Vulcan despite the fact that neither confidentiality agreement contained a standstill provision.

Facts

Precipitated by Marietta's fear of being acquired by Vulcan or other third parties through a hostile takeover, Marietta and Vulcan began discussing a possible friendly merger in early 2010. As a prerequisite to such discussions, the parties entered into two confidentiality agreements with each other, the first a customary non-disclosure agreement and the second a joint defense agreement addressing information sharing regarding possible antitrust implications of the proposed merger. Neither confidentiality agreement contained a standstill provision. A standstill provision is a provision in which a hostile bidder agrees to not pursue a takeover of the target company for a specified period of time.

Over the course of the friendly merger discussions, Marietta's economic position improved as compared to Vulcan, and Marietta initiated an unsolicited bid to purchase all of Vulcan's outstanding shares of common stock and commenced a proxy contest to elect four new members to Vulcan's board of directors. Marietta used the confidential information acquired through its merger negotiations with Vulcan in Marietta's publicly filed Form S-4, which was required to be filed pursuant to SEC rules governing exchange offers, and in other publicly disseminated material describing the transaction.

Marietta brought suit seeking a declaratory judgment that the confidentiality agreements did not bar Marietta's unsolicited bid or proxy contest, and Vulcan counterclaimed seeking to enjoin Marietta from proceeding with its exchange offer and proxy contest.

Analysis and Outcome

The Court's opinion was mainly based on the definition of "Transaction" ("a possible business combination transaction . . . between" the parties) in the confidentiality agreements. The confidentiality agreements prohibited the parties from using confidential information for any purpose other than for evaluating or pursuing the Transaction and so, the main issue decided by the Court was whether the definition of Transaction set forth in the confidentiality agreements allowed Marietta to use confidential information for a hostile takeover bid, or whether Marietta was limited to only using confidential information for a negotiated merger between the parties. The Court found the confidentiality agreements to be ambiguous and so, looked to extrinsic evidence to decide this issue and ultimately determined that the term Transaction, as used in the confidentiality agreements, was limited to a friendly, negotiated merger between the parties.

The Court also found the provisions of the confidentiality agreements allowing the parties to disclose confidential information when they were legally required to do so were ambiguous as to whether Marietta's disclosure in a Form S-4 was permissible under the confidentiality agreements. After analyzing extrinsic evidence, the Court held that such provisions only allowed the parties to disclose confidential information when legally required to do so by external demands (i.e. subpoenas) and not by discretionary, self-initiated acts such as undertaking an exchange offer and filing a Form S-4. The Court also held that, even if the disclosure of the confidential information was "legally required" and thus, permissibly disclosed, Marietta was not permitted to continue to publicly disclose the confidential information unless the subsequent disclosure was legally required.

After finding that Marietta had breached the confidentiality agreements, the Court enjoined Marietta from pursuing its exchange offer and proxy contest for four months, the time that would have elapsed from when Marietta commenced its exchange offer to the expiration of the non-disclosure agreement.

Practical Considerations

Martin Marietta Materials, Inc. v. Vulcan Materials Company is a reminder of the importance of clear drafting in confidentiality agreements. Clients and legal professionals should ensure that confidentiality agreements unambiguously express the intent of the parties. If an acquiror is successful in negotiating a standstill provision out of a confidentiality agreement, the acquiror may want to ensure that the other terms of the confidentiality agreement are clearly drafted to allow such party to retain the flexibility to make a hostile bid in the future.

Additional Information

For additional information, please contact:

Megan L. Mehalko at (216) 363-4487 or mmehalko@beneschlaw.com

Ryan S. Quinn at (216) 363-4150 or rquinn@beneschlaw.com

Biographical information is available at www.beneschlaw.com.