Notes

"Between" a Rock and a Hard Place: *Martin Marietta v. Vulcan* and the Rise of the Backdoor Standstill

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A recent trend has created an anomaly in interpreting confidentiality agreements in the context of merger negotiations. After the Canadian decision in Certicom v. Research in Motion *and the Delaware Court of Chancery and Delaware Supreme Court's decisions in* Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, standstill agreements may be read into standard confidentiality agreements without being separately negotiated or intended. These decisions have created the force of entire agreements out of the words "between" and "legally required." This Note argues for a contextualist, rather than traditionalist, approach to interpreting these "backdoor" standstills to avoid unintended consequences for parties to these agreements.*

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INTRODUCTION

A merger or acquisition is the most fundamental change for a corporation: it ends the existence of one corporation when it is absorbed by another.[1] In contemplating a merger, firms must determine whether the decision to merge will result in higher future returns, the firm to be acquired is properly valued, and the merger will result in more efficiency.[2] In evaluating whether to pursue a merger, companies are required to exchange information that they may wish to keep confidential. Companies

1. WILLIAM A. KLEIN ET AL., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 222 (11th ed. 2010).

2. WILLIAM W. BRATTON, CORPORATE FINANCE: CASES AND MATERIALS 766 (6th ed. 2007).

discussing a potential merger negotiate confidentiality agreements early on to protect misuse and unwanted disclosure of proprietary information. A company that wishes to avoid a hostile takeover attempt will usually separately negotiate a standstill provision to expressly preclude the other company from launching a hostile bid.[3]

A recent Canadian decision, *Certicom Corp. v. Research in Motion Ltd.*, and the Delaware Court of Chancery and Delaware Supreme Court decisions in *Martin Marietta Materials, Inc. v. Vulcan Materials Co.* have promoted a method of sidestepping the need to negotiate an express standstill.[4] These "backdoor" standstill agreements are established through an interpretation of the use and disclosure provisions of confidentiality agreements. Courts have also created these backdoor standstills through the remedies imposed for breach of confidentiality agreements. The recent direction of these courts—broadly interpreting certain confidentiality agreements to effectively create standstill agreements—may generate crippling results.

Competing theories of contractual interpretation produce varying results in this context. This Note argues that the recent trend toward adopting the traditionalist interpretation of confidentiality agreements is unfair to parties and shareholders and makes compliance with federal disclosure requirements difficult. Part I summarizes the background of confidentiality agreements in the context of mergers and acquisitions ("M&A"), as well as required federal securities disclosures. Part II discusses the two competing approaches to the interpretation of contracts. Part III explores the recent judicial trend in broadly interpreting confidentiality agreements, providing an in-depth analysis of the *Certicom* and *Martin Marietta* decisions and their potential ramifications. Part IV examines a hypothetical case under the two competing interpretive approaches, advocating for a contextualist approach in favor of honoring the intent of the parties.

I. Mergers and Acquisitions, Confidentiality, and Required Securities Disclosures

A merger is a transaction in which one corporation purchases the assets and liabilities of another corporation in exchange for its own securities or cash, or a combination of both.[5] A company entertaining acquisition offers is required to release certain information to enable the

3. A "hostile" takeover bid is one that is opposed by incumbent management. A "friendly" bid is supported by management. Klein et al., *supra* note 1, at 190.

4. Certicom Corp. v. Research in Motion Ltd. (2009), 94 O.R. 3d 511 (Can. Ont. Sup. Ct. J.); Martin Marietta Materials, Inc. v. Vulcan Materials Co. (*Martin Marietta I*), 56 A.3d 1072 (Del Ch. 2012); Martin Marietta Materials, Inc. v. Vulcan Materials Co. (*Martin Marietta II*), 68 A.3d 1208 (Del. 2012).

5. Klein et al., *supra* note 1, at 222.

potential buyers to make their best offers.[6] Confidentiality agreements protect this sensitive information from being misused.[7] This Part provides background about the standard agreements made early in merger negotiations, as well as an overview of the disclosure requirements and confidential treatment under federal securities law.

A. Confidentiality Agreements and Standstill Agreements

Confidentiality agreements and standstill agreements are widely accepted practices in the M&A context. Confidentiality agreements protect confidential information that may be shared during the evaluation of a potential merger. Standstill agreements are separate agreements or provisions that preclude an unsolicited purchase from a buyer.

1. Confidentiality Agreements

In the context of merger discussions, a confidentiality agreement is generally the very first agreement signed.[8] A confidentiality agreement represents the dual interests of the parties in protecting confidential information shared in order to evaluate whether to proceed with a merger.[9]

A confidentiality agreement normally covers the following issues:

- the definition of the information that will be subject to the terms of the agreement (usually stated very broadly as covering all information that is provided) and exceptions to the definition or to the confidentiality obligations imposed by the agreement (such as information that is already publicly available);
- the obligation to preserve the confidentiality of the information that is provided, together with provisions for enforcement of that obligation;
- the obligation to limit use of the information to evaluation and negotiation of a possible transaction;
- a disclaimer of any obligation to negotiate or complete a transaction;
- an obligation to return or destroy the information that has been provided (and related notes and analyses), to the extent the information is in tangible, electronic, or other retrievable form, if discussions are terminated; and
- a disclaimer of any representation or warranty as to the accuracy or completeness of the information that is being provided, deferring

6. Aaron D. Rachelson, Corporate Acquisitions, Mergers & Divestitures § 1:29 (2013).

7. Ugo Draetta, *Precontractual Documents in Merger or Acquisition Negotiations: An Overview of the International Practice*, 16 N.C. J. Int'l L. & Com. Reg. 45, 47 (1991).

8. Am. Bar Ass'n, The 17th Annual National Institute on Negotiating Business Acquisitions A-5 (2012).

9. *Id.*

> any such representations to a definitive acquisition agreement between the parties.[10]

Because confidentiality agreements are entered into so early on in negotiations, they "typically do not describe in any detail the type of transaction that may result."[11]

2. *Standstill Agreements*

While confidentiality agreements "may prevent disclosure of confidential information, they do not, by themselves, preclude the bidder from using it for its own purposes."[12] Through a separately negotiated standstill agreement or provision, target companies in a merger context can preclude any unsolicited tender offers that might take advantage of such information.[13] A standstill provision generally provides that a buyer will not try to buy the target on an unsolicited basis, buy its securities in the open market, or make an otherwise hostile offer to buy the target.[14] It has been acknowledged that use restrictions in a standard confidentiality agreement do not provide enough protection, and lawyers prefer to negotiate separate standstill provisions that have specific durations.[15]

B. Federal Securities Requirements Under the Williams Act

Federal securities laws require certain disclosures for publicly traded companies. In the context of tender offers,[16] the provisions enacted under the Williams Act establish affirmative disclosure requirements.[17] This Subpart provides a brief overview of the Williams Act and its required disclosures.

In 1968, the Williams Act amended the Securities Exchange Act of 1934 by adding provisions that required various disclosures, prohibited

10. Am. Bar Ass'n Mergers & Acquisitions Comm., Model Stock Purchase Agreement with Commentary 70 (2d ed. 2010).

11. *Id.* at 71.

12. William J. Carney, Mergers and Acquisitions: Cases and Materials 369 (2000).

13. *Id.*

14. Richard E. Climan et al., *Negotiating Acquisitions of Public Companies in Transactions Structured as Friendly Tender Offers*, 116 Penn St. L. Rev. 615, 637 (2012). Although the legality of standstill agreements has been questioned as potentially illegal shareholder vote-selling or a breach of the management's fiduciary duties to its shareholders, standstill agreements have generally been found to be enforceable. *See* Steven A. Baronoff, Note, *The Standstill Agreement: A Case of Illegal Vote Selling and a Breach of Fiduciary Duty*, 93 Yale L.J. 1093, 1093 (1984); Brian K. Kidd, *The Need For Stricter Scrutiny: Application of the* Revlon *Standard to the Use of Standstill Agreements*, 24 Cardozo L. Rev. 2517, 2520–21 (2003).

15. Climan et al., *supra* note 14, at 641–42 ("[I]f in fact there is no disagreement in principle as to whether or not the prospective buyer can unilaterally go hostile, I don't want there to be any doubt or question. . . . Many practitioners don't focus on the use restriction with a standstill mindset.").

16. A "tender offer" is made by inviting shareholders to tender their shares to a representative of the bidding corporation. Klein et al., *supra* note 1, at 189.

17. Along with the protections of the Williams Act, a majority of the states have also adopted antitakeover statutes. *Id.* at 206.

fraudulent conduct in connection with tender offers, and mandated provisions that must be a part of all tender offers.[18] Congress, concerned about the pace of takeovers and the possibility that shareholders were coerced into tendering their shares,[19] enacted the Williams Act to ensure full and fair disclosure to investors responding to tender offers, and to give shareholders the opportunity to examine the relevant facts to make a decision without pressure.[20] The disclosure scheme and subsequent Securities and Exchange Commission ("SEC") rules provided under the Williams Act allow a target company's shareholders the appropriate time and information to decide whether to tender their shares.[21] These "line-item" disclosure requirements adopted by the SEC "expressly call for the disclosure of negotiations."[22] Practitioners accept that these line items are deemed to be material and that omitting such information would be a violation of SEC rules.[23]

Section 13(d) of the Securities Exchange Act of 1934 requires that a person who acquires five percent or more of another company's voting equity securities disclose:

> [I]nformation as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities . . . or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.[24]

Acquiring more than five percent of a company's voting equity securities triggers the duty to file a Schedule 13D, which sets forth these disclosures as line items.[25] Item 6 of Schedule 13D requires disclosure of "any contracts, arrangements, understandings, or relationships (legal or otherwise) among the persons named in Item 2 [the reporting person] and between such persons and any person with respect to any securities of the issuer."[26]

If a tender offer would result in beneficial ownership of more than five percent of the class of securities, section 14(d) requires that the offeror

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18. 15 U.S.C. §§ 78m(d)–(e), n(d)–(f) (2012).

19. KLEIN ET AL., *supra* note 1, at 193.

20. SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 948 (9th Cir. 1985).

21. Steven G. Sanders, Comment, *Line-Item Disclosure Provisions and the Materiality of Preliminary Merger Negotiations After* In Re *George C. Kern, Jr.*, 59 BROOK. L. REV. 175, 191 (1993).

22. J. Robert Brown, Jr., *Corporate Secrecy, the Federal Securities Laws, and the Disclosure of Ongoing Negotiations*, 36 CATH. U. L. REV. 93, 103 (1986).

23. Ronald J. Colombo, *Effectuating Disclosure Under the Williams Act*, 60 CATH. U. L. REV. 311, 321 (2011).

24. 15 U.S.C. § 78m(d)(1)(E) (2012).

25. ARNOLD S. JACOBS, THE WILLIAMS ACT—TENDER OFFERS AND STOCK ACCUMULATIONS 99 (2011).

26. 17 C.F.R. § 240.13d-101 (2013).

make certain additional filings.[27] Similar to section 13(d), section 14(d)(1) requires line-item disclosures.[28] Disclosures under section 14(d) are set forth in a Schedule 14D. Item 3(b) "requires disclosure of any 'contacts, negotiations or transactions' between the target and a bidder concerning a 'merger, consolidation or acquisition; a tender offer or other acquisition of securities; an election of directors; or a sale or other transfer of a material amount of assets.'"[29] Item 7 of Schedule 14D-1 requires disclosure of "any contract, arrangement, understanding or relationship (whether or not legally enforceable) between the bidder . . . and any person with respect to any securities of the [target] company."[30] A Schedule TO must also accompany a tender offer.[31] Item 5 of Schedule TO requires disclosure of information required by Items 1005(a) and (b) of Regulation M-A.[32] Regulation M-A, Item 1005(b) describes "significant corporate events" as:

> [A]ny negotiations, transactions or material contacts during the past two years between the filing person (including subsidiaries of the filing person and any person specified in Instruction C of the schedule) and the subject company or its affiliates concerning any: (1) Merger; (2) Consolidation; (3) Acquisition; (4) Tender offer for or other acquisition of any class of the subject company's securities; (5) Election of the subject company's directors; or (6) Sale or other transfer of a material amount of assets of the subject company.[33]

Thus, Schedule TO requires tender offerors to disclose to the SEC negotiations and transactions concerning a merger.

Exchange offers in which stock is to be issued require a Form S-4.[34] Item 6 requires the filer to describe any "material contracts, arrangements, understandings, relationships, negotiations, or transactions," past or present, "between the company being acquired or its affiliates and the registrant or its affiliates, such as those concerning: a merger, consolidation or acquisition; a tender offer or other acquisition of securities; an election of directors; or a sale or other transfer of a material amount of assets."[35]

SEC rules contain certain processes for treating material filed with the SEC as confidential. However, each of these processes require that the filer file confidential material separately with the SEC and provide an application making any objection to the disclosure of the confidential

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27. Larry D. Soderquist & Theresa A. Gabaldon, Securities Law 142 (2011); 15 U.S.C. § 78n(d) (2012).

28. Jacobs, *supra* note 25, at 111–12.

29. Brown, *supra* note 22, at 103 (quoting 17 C.F.R. § 240.14d-100 (1986)).

30. 17 C.F.R. § 240.14d-100.

31. *Id.*

32. *Id.*

33. *Id.* § 229.1005.

34. *Id.* § 239.25; U.S. Sec. Exch. Comm'n, SEC 2077 (12-08), Form S-4, Registration Statement Under the Securities Act of 1933 (2008).

35. *Id.* at Item 6.

portion, and stating the grounds of such objection.[36] The grounds for objection and exemption include "trade secrets and commercial or financial information obtained from a person and privileged or confidential," which encompasses "[i]nformation contained in reports, summaries, analyses, letters, or memoranda arising out of, in anticipation of or in connection with an examination or inspection of the books and records of any person or any other investigation."[37]

For public companies, federal securities laws require many disclosures in connection with tender offers. These requirements create conflict when weighed against the requirements drawn by confidentiality agreements between two parties to a merger negotiation.

II. Interpretation of Contracts: Traditionalist vs. Contextualist

For parties in a contractual dispute, the court's interpretation of the contract terms is paramount. This Part will provide an overview of the different judicial approaches to contract interpretation, which this Note will return to in Part IV, which discusses the implications of using these methods of interpretation on language that may create "backdoor" standstill agreements.

Courts differ in their approaches to contract interpretation and generally fall into one of two camps: the traditionalist[38] Willistonian[39] approach, or the contextualist[40] Corbinian[41] approach.[42] These competing approaches differ in their use of extrinsic evidence—or information not

36. 17 C.F.R. § 240.24(b)-(2) (requiring filing of confidential material separately with the SEC, along with an application making objection to the disclosure of the confidential portion); *id.* § 230.406 (requiring separate filing of the confidential portion with the SEC and application making objection to disclosure); *id.* § 200.83 (allowing persons submitting information to request that it be withheld when requested under the Freedom of Information Act). Rule 83 is a catchall provision that only applies if no other statute or rule "provides procedures for requesting confidential treatment respecting particular categories of information." *Id.* § 200.83. Under Rule 83, the person submitting information must mark the confidential pages with "Confidential Treatment Requested by [name]" along with a "written request for confidential treatment which specifies the information as to which confidential treatment is requested." *Id.*

37. *Id.* § 200.80.

38. The Willistonian approach assumes that contracts have "plain meanings" that are apparent to the interpreter. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 Yale L.J. 541, 572 (2003).

39. Samuel Williston, arguably the most widely known contracts scholar, was a formalist and the author of the treatise *Williston on Contracts*. *See generally* Samuel Williston, Williston on Contracts (1920).

40. The contextualist approach allows courts to consider all material evidence in resolving interpretive issues. Thus, the main difference in the two approaches is the size of the evidentiary base upon which the court bases its determination. Schwartz & Scott, *supra* note 38, at 572–73.

41. Arthur Corbin was a proponent of the philosophy of legal realism and the author of the treatise *Corbin on Contracts*. *See generally* Arthur L. Corbin, Corbin on Contracts (1952).

42. Juliet P. Kostritsky, *Plain Meaning vs. Broad Interpretation: How the Risk of Opportunism Defeats a Unitary Default Rule for Interpretation*, 96 Ky. L.J. 43, 55 (2008).

embodied in the written agreement—in contract interpretation. Many state courts, including Delaware, use the traditionalist "four corners" rule to determine whether extrinsic evidence should be admitted in interpretation.[43] Although "the role of a court is to effectuate the parties' intent" in interpreting a contract, courts using the traditionalist approach are "constrained by a combination of the parties' words and the plain meaning of those words."[44] Under the traditionalist approach, the court may consider evidence outside of the plain meaning of the contract language only if the language is ambiguous.[45] Ambiguity exists if the terms are fairly susceptible to different interpretations or may have two or more different meanings.[46] For courts using this approach, "[t]he true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant."[47] The rationale for this approach is that the plain language should control if the meaning is clear because "creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented."[48] If the court finds ambiguity, it will look beyond the terms of the contract and may consider extrinsic evidence to determine the intent of the parties.[49]

A minority of states, including California, use the contextualist approach, which interprets contractual meaning in light of all the circumstances that help explain the context in which the drafter used the words in a contract.[50] The rationale for this approach is that "[t]he exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended."[51] Extrinsic evidence exposes latent ambiguities that may exist even if language appears unambiguous to a judge.[52] Thus, extrinsic evidence is admissible to explain the meaning of a contract if the evidence is relevant to prove a meaning to which the language is reasonably susceptible.[53] The purpose of this approach is to uphold the intent of the parties.[54]

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43. Riverbend Cmty., LLC v. Green Stone Eng'g, LLC, 55 A.3d 330, 334 (Del. 2012).

44. Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d 728, 739 (Del. 2006).

45. *Id.*

46. Eagle Indus., Inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228, 1232 (Del. 1997).

47. *Lorillard*, 903 A.2d at 739 (quoting Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co., 616 A.2d 1192, 1196 (Del. 1992)).

48. *Id.*

49. GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P., 36 A.3d 776, 780 (Del. 2012).

50. Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 442 P.2d 641, 645 (Cal. 1968).

51. *Id.*

52. Wolf v. Superior Court, 8 Cal. Rptr. 3d 649, 655–56 (Cal. Ct. App. 2004).

53. *Pac. Gas & Elec. Co.*, 442 P.2d at 644.

54. *Id.* ("In this state, however, the intention of the parties as expressed in the contract is the source of contractual rights and duties."); Cal. Civ. Code § 1636 (West 2014) ("A contract must be so

The methodology the court uses to interpret a contract can elicit very different outcomes from the same facts. Below, Part IV examines a set of facts under both approaches, advocating for a contextualist approach in interpreting confidentiality agreements with potential "backdoor" standstills. Interpreting terms of a confidentiality agreement to create the effect of a standstill agreement is unfair and confusing to the drafters of such contracts.

III. Recent Court Decisions Creating Backdoor Standstills

Recent court decisions in Canada and the United States have created troublesome precedent in interpreting confidentiality agreements. In *Certicom Corp. v. Research in Motion Ltd.*,[55] a Canadian court interpreted the word "between" to create an effective standstill agreement out of the terms of a nondisclosure agreement. The Delaware Court of Chancery and Delaware Supreme Court followed suit in *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, and issued an injunction preventing a hostile bid as the remedy for breach of two confidentiality agreements.[56] This Part summarizes these cases and discusses the repercussions of the analysis and remedies provided by these courts.

A. *Certicom v. Research in Motion* (Canada)

The 2009 Canadian decision in *Certicom* set recent precedent for American courts dealing with terms of confidentiality agreements.[57] In *Certicom*, the parties' use of the word "between" in certain confidentiality agreements operated to block the unsolicited takeover bid of one party for the other.[58] The court used its plain language interpretation of "between" to find an effective standstill in a provision of the confidentiality agreement, even though there was a separately negotiated standstill provision that had a shorter term.[59]

The nondisclosure agreements ("NDAs") between Certicom and Research in Motion ("RIM") defined the purpose for which use of the confidential information was permitted to mean "assessing the desirability or viability of establishing or furthering a business or contractual relationship between the Parties which may include, without limitation, some form of business combination between the Parties."[60] At issue for the Canadian court was "whether a hostile take-over bid is some form of

interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting.").

55. (2009), 94 O.R. 3d 511, para. 59 (Can. Ont. Sup. Ct. J.).

56. 56 A.3d 1072 (Del Ch. 2012), *aff'd* 68 A.3d 1208 (Del. 2012).

57. *See generally Certicom*, 94 O.R. 3d 511.

58. *Id.* at para. 97.

59. *Id.* at para. 53.

60. *Id.* at para. 13.

a business combination between the parties and therefore whether the Confidential Information could be used for the purpose of assessing the desirability of a hostile bid."[61] The NDA in question contained a separate standstill agreement with an expiration date.[62] After the standstill period expired, RIM launched its hostile bid for Certicom.[63] Certicom claimed that RIM's use of confidential information in evaluating its hostile bid breached the terms of the NDA regarding confidentiality and sought a permanent injunction to prevent RIM from advancing its bid.[64]

The court, accepting that "a takeover bid can constitute a business combination" as required by the NDA, nonetheless held that "a takeover bid is not necessarily a business combination *between* the parties."[65] The court used the dictionary definition of "between" and decided that it meant that the relationship between Certicom and RIM was contractual, and thus a takeover bid would only amount to "a business combination *between* the parties" if Certicom agreed to RIM's bid.[66] The court explained:

> Thus, a confidentiality provision can independently prohibit the use of the information disclosed for the purpose of assessing the desirability of a hostile bid and thereby hamper the ability of the 'disclosee' to make an unsolicited bid. A standstill provision is better protection, removing the need for proof, and costly litigation.[67]

Thus the court admitted that its interpretation of the contract created an effective standstill despite the fact that a standstill provision was separately drafted.

The court issued a permanent injunction prohibiting RIM from "taking any steps to advance the hostile takeover bid."[68] It also noted that RIM was "free to make a friendly bid, and, should it manage to craft a manner of launching a subsequent hostile bid without breaching the non-disclosure agreements, as Certicom submits it is possible to do, another hostile bid."[69]

The court itself expressed skepticism as to whether it would be possible for RIM to launch a hostile bid without breaching the NDA, but nonetheless left a subsequent hostile bid as a possibility. Regardless, through its remedy of injunction, the court effectively enforced the NDA as a standstill agreement despite the fact that a separate standstill provision already existed.

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61. *Id.*
62. *Id.* at para. 15.
63. *Id.* at para. 36.
64. *Id.* at para. 2.
65. *Id.* at para. 48, 50 (emphasis added).
66. *Id.* at para. 52–53 (emphasis added).
67. *Id.* at para. 56.
68. *Id.* at para. 97.
69. *Id.*

B. The *Martin Marietta* Decisions

The recent Delaware Court of Chancery[70] and Delaware Supreme Court[71] decisions in *Martin Marietta Materials, Inc. v. Vulcan Materials Co.* exemplify the difficulties facing the courts in deciding contractual disputes involving confidentiality agreements. The dispute involved two rivals considering a merger, but behind the negotiations lay power struggles and intra-corporate politics. The history of negotiations between the two companies and the terms of the agreements that they signed are informative as to the ultimate outcome of the case in both the Delaware Court of Chancery and the Delaware Supreme Court.

Martin Marietta Materials, Inc. ("Martin Marietta") and Vulcan Materials Co. ("Vulcan") are the two largest construction aggregate companies in the United States.[72] Over the past decade, Martin Marietta and Vulcan periodically discussed the possibility of a merger, but no significant progress was made until 2010.[73] In 2010, Martin Marietta's newly appointed CEO, Ward Nye, and Vulcan's longtime CEO, Don James, rekindled friendly merger talks.[74] Originally, Vulcan was seen as the natural acquirer, and Nye was concerned with confidentiality because he was interested in keeping his new CEO position and did not want Martin Marietta to be subject to a hostile takeover by Vulcan or another company.[75] Nye's motivations in seeking a deal and keeping confidentiality were driven by entrenchment:

> Critically for Nye personally, Nye perceived . . . that the timing was right for a combination whereby Nye would end up as CEO. . . . Nye felt that this was a good moment to engage but if, and only if, he could get assurances to calm his nerves about the possibility that leaked discussions would end up putting Martin Marietta in play.[76]

The two CEOs agreed to keep their discussions completely confidential in order to prevent any potential leaks that might trigger unsolicited activity from other companies.[77] The companies memorialized this agreement in the two confidentiality agreements at issue, the NDA, and the Joint Defense Agreement ("JDA").[78]

The NDA—which had a term of two years, ending on May 3, 2012—governed the exchange and treatment of evaluation material.[79] The definition of "evaluation material" included non-public information

70. *Martin Marietta I*, 56 A.3d 1072 (Del Ch. 2012).
71. *Martin Marietta II*, 68 A.3d 1208 (Del. 2012).
72. *Id.* at 1210.
73. *Id*.
74. *Id.*
75. *Id.* at 1210–11.
76. *Martin Marietta I*, 56 A.3d 1072, 1081 (Del Ch. 2012).
77. *Martin Marietta II*, 68 A.3d at 1211.
78. *Id.*
79. *Id.*

disclosed, all analyses based upon that information, and the fact that the parties were discussing a transaction.[80] The NDA was drafted by Martin Marietta's general counsel, relying on a form from a previous agreement between the parties.[81] Martin Marietta's general counsel made "unilateral" changes to the form that made the NDA stronger by enlarging the scope of the information subject to the NDA's restrictions and limiting the permissible uses and disclosures of the information covered by the NDA.[82] The parties limited the application of the evaluation material for the sole "purpose of evaluating a Transaction," which was defined as "a possible business combination transaction *between* Martin Marietta and Vulcan or one of their respective subsidiaries."[83]

The NDA also provided in Paragraph 3 that:

> Subject to paragraph (4), each party agrees that, without the prior written consent of the other party, it . . . will not disclose to any other person, *other than as legally required*, the fact that any Evaluation Material has been made available hereunder, that discussions or negotiations have or are taking place concerning a Transaction or any of the terms, conditions or other facts with respect thereto.[84]

Paragraph 4 established a notice and vetting process for circumstances in which a party was required to disclose confidential material. This process was described in a section entitled "Required Disclosure," which defined "required" to mean by an external demand — "by oral questions, interrogatories, requests for information or documents in legal proceedings, subpoena, civil investigative demand or similar process."[85]

The second confidentiality agreement, the JDA, had an indefinite term and governed information sharing in facilitation of a joint analysis of the antitrust implications of the potential merger.[86] The JDA defined "'Transaction' as 'a *potential transaction being discussed* by Vulcan and Martin[] . . . involving the combination or acquisition of all or certain of their assets or stock.'"[87] The JDA limited use of confidential materials to "solely for purposes of pursuing and completing *the Transaction*."[88] Though neither party discussed including a standstill provision in either the NDA or the JDA, the agreements were made in the context of

80. *Id.*
81. *Id.*
82. *Martin Marietta I*, 56 A.3d 1072, 1082 (Del Ch. 2012)
83. *Martin Marietta II*, 68 A.3d at 1211–12 (emphasis added).
84. *Id.* at 1212.
85. *Id.*
86. *Id.* at 1213.
87. *Id.* (alterations in original).
88. *Id.*

friendly merger negotiations, and Nye stressed the importance of the fact that Martin Marietta was not for sale.[89]

In spring 2011, Vulcan's stock value declined in comparison to Martin Marietta's.[90] Martin Marietta, originally the target of acquisition, began to consider acquiring Vulcan at a premium.[91] After using confidential material disclosed by Vulcan in its deliberations, Martin Marietta launched an unsolicited exchange offer to purchase all of Vulcan's outstanding shares, as well as a proxy contest, announced by a public bear hug letter in December 2011.[92] Martin Marietta filed an S-4 and proxy statement with the SEC in connection with the exchange offer and proxy contest, discussing the history of its negotiations with Vulcan and other confidential information in the filings.[93] Martin Marietta also disclosed confidential material for public relations uses in investor calls and presentations.[94]

On the same day that it launched its hostile takeover bid, Martin Marietta brought suit in the Court of Chancery to obtain a declaration that the confidentiality agreements did not bar the exchange offer or proxy contest.[95] Vulcan filed counterclaims seeking a finding that Martin Marietta breached the confidentiality agreements and an injunction from proceeding with the hostile bid.[96]

1. *Delaware Court of Chancery Decision*

The Delaware Court of Chancery held that Martin Marietta breached both the NDA and the JDA by using and disclosing confidential material that was protected by the agreements.[97] Vulcan advanced four arguments to prove that Martin Marietta breached the confidentiality agreements: (1) the confidentiality agreements precluded Martin Marietta from using evaluation material to pursue a hostile bid because the agreements limited the use of such information to a transaction that was the product of a voluntary contractual decision between the governing boards; (2) "even if Martin Marietta was free to use the Evaluation Material to consider [its hostile offer], it was not permitted to disclose that information or the fact" that the discussions had taken place because the

89. *Id.* at 1211.

90. *Martin Marietta I*, 56 A.3d 1072, 1093 (Del Ch. 2012)

91. *Id.*

92. *Martin Marietta II*, 68 A.3d at 1214–15. A bear hug letter is a preliminary offer letter from a bidder to acquire a target, which carries an implicit threat to deal directly with the stockholders in a hostile takeover if the target does not negotiate. *See* Andrew Ross Sorkin, *The Art of Giving a Bear Hug*, N.Y. TIMES (FEB. 5, 2008), http://www.nytimes.com/2008/02/05/technology/05sorkin.html?_r=1&

93. *Martin Marietta II*, 68 A.3d at 1215–16.

94. *Id.* at 1216.

95. *Id.*

96. *Id.*

97. *Martin Marietta I*, 56 A.3d 1072, 1076 (Del Ch. 2012)

exception for "'legally required' disclosures only applied when a party received an External Demand;" (3) "even if Martin Marietta was legally required . . . to disclose [the] information by SEC Rules, [its tactical disclosures] went well beyond any legal requirement;" and (4) Martin Marietta's disclosure of information to the public beyond the SEC filings was not legally required.[98]

The court approached these claims in turn, first determining whether the terms of the agreements were ambiguous, and then turning to extrinsic evidence to determine the parties' intent.[99] In interpreting the NDA to determine whether Martin Marietta was allowed to use evaluation material to undertake a hostile bid, the court examined whether the terms "business combination transaction" and "between" were unambiguous.[100] The court determined that "business combination transaction" was subject to multiple interpretations and could not conclude based on the text alone whether the term could encompass Martin Marietta's exchange offer and proxy contest. The court then examined the word "between," and found both Vulcan's and Martin Marietta's readings to be plausible.[101] The court discussed the *Certicom* decision, but nonetheless stated that "between" was not a safe way for parties to limit usage of information to a negotiated transaction.[102]

After concluding that the plain text of the NDA did not unambiguously support one reading and that the readings advanced by both parties were reasonable, the court turned to extrinsic evidence.[103] The extrinsic evidence showed (1) that Martin Marietta's counsel drafted the agreement to strengthen the protections, (2) Nye did not want to put Martin Marietta in play and emphasized that it was "not for sale," and (3) Martin Marietta deliberately concealed its use of the evaluation material in the months leading up to the hostile bid.[104] These factors supported Vulcan's reading that "business combination transaction between" only meant a consensual, contractually agreed upon merger of the companies.[105] Thus, the "between the parties" language in the confidentiality agreements barred both parties from using the confidential information in consideration of anything but a contractually negotiated, consensual merger deal.[106] The court held that the exchange offer and proxy contest both failed this definition of transaction, and therefore that

98. *Id.* at 1103.
99. *Id.* at 1105–06.
100. *Id.* at 1105.
101. *Id.* at 1115.
102. *Id.* at 1117.
103. *Id.* at 1117.
104. *Id.* at 1118–19.
105. *Id.* at 1121.
106. *Id.*

Martin Marietta breached the use restrictions of the NDA.[107] Because the terms of the JDA defined "transaction" as "a potential transaction *being discussed* by Vulcan and Martin Marietta," the court concluded without looking to extrinsic evidence that Martin Marietta separately breached the JDA in preparing its hostile bid because the only transaction "being discussed" by the parties was a negotiated one.[108]

The court then examined the term "legally required" to determine whether Martin Marietta was contractually entitled to disclose confidential information in its SEC filings.[109] The court found that both parties' readings were reasonable, although Martin Marietta's reading was subject to some "strain."[110] In looking to the extrinsic evidence, the court held that the drafting history made clear that the definition of "legally required" was meant to be restrictive.[111] The extrinsic evidence cited by the court included the fact that Martin Marietta's counsel purposely drew a link between the "Required Disclosures" subject to the notice and vetting process and the term "legally required" in the next paragraph,[112] and that Martin Marietta's own CEO expressed his intent to prevent Vulcan from pursuing a hostile bid.[113] Thus, the court found that the exception for "legally required" disclosure meant in response to an external demand (such as a subpoena) in accordance with the notice and vetting process, and not in response to a discretionary action triggering a disclosure obligation.[114] Because the terms of the NDA limited the definition of "legally required," Martin Marietta breached the NDA when it disclosed information to the SEC in its S-4.[115]

The court explained:

> [E]ven where a confidentiality agreement does not contain an express standstill provision, transactional lawyers are advised that restricting the scope of legally required disclosures to those that arise in the context of some sort of discovery obligation or affirmative legal process *may have the effect of creating a backdoor standstill restriction* if what is subject to that restricted definition is Transaction Information . . . that would need to be disclosed under Regulation M-A in the event that one of the parties to the agreement sought to pursue an unsolicited offer for the other.[116]

Martin Marietta breached its non-disclosure obligations under the NDA because it did not disclose negotiating history in response to an

107. *Id.*
108. *Id.*
109. *Id.* at 1122.
110. *Id.* at 1126.
111. *Id.* at 1128.
112. *Id.* at 1129.
113. *Id.* at 1131.
114. *Id.* at 1134.
115. *Id.* at 1135.
116. *Id.* at 1135 (emphasis added).

external demand.[117] The court explained that, even if the disclosures were legally required, Martin Marietta failed to abide by the notice and vetting process, thus breaching its procedural obligations under the NDA.[118] Furthermore, even if it were permitted to disclose the information to the SEC, Martin Marietta over-disclosed and provided a one-sided, opinionated account of the negotiations in its filings, and further disclosed the information to investors and the media, far exceeding any hypothetical legal requirement.[119]

The court enjoined Martin Marietta from pursuing its hostile bid for four months, which precluded Martin Marietta from running its slate of directors for election at Vulcan's annual meeting on June 1, 2012.[120] Because the parties had agreed in the NDA that money damages would be an insufficient remedy for a breach by any party, and that the non-breaching party would be entitled to equitable relief, including injunction,[121] the court held that this stipulation was sufficient to demonstrate irreparable harm.[122] Furthermore, because "Vulcan [was] now suffering from exactly the same kind of harm Nye demanded the Confidentiality Agreements shield Martin Marietta from," namely, "an unsolicited acquisition offer in a down market when it was not a good time to sell," the court determined that irreparable harm was established.[123] The court determined that the four-month injunction period was "a responsible period" referenced by the time between the date Martin Marietta launched the exchange offer and the expiration date of the NDA. Thus, Vulcan "simply [sought] the minimum period of repose during which its Evaluation Material and the Transaction Information could not be used against it to forcibly effect a transaction."[124]

The Court of Chancery, employing a traditionalist approach to contractual interpretation, determined that the confidentiality agreements were ambiguous, and therefore looked to extrinsic evidence to interpret that the parties intended the agreements to prevent the other party from using confidential information other than for a negotiated deal. This decision laid the framework for the Delaware Supreme Court to review on appeal.

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117. *Id.*

118. *Id.*

119. *Id.* at 1137.

120. *Id.* at 1147. This effectively delayed Martin Marietta from running its slate of directors until the next Vulcan meeting in June 2013, putting a halt to the hostile takeover attempt for over a year. Martin Marietta has not since attempted another hostile bid. *Martin Marietta to Explore Friendly Offer for Vulcan—WSJ*, REUTERS (Dec. 3, 2012, 1:29 AM), http://www.reuters.com/article/2012/12/03/martinmarietta-offer-idUSL4N09D1T520121203.

121. *Martin Marietta I*, 56 A.3d at 1144.

122. *Id.* at 1145.

123. *Id.* at 1146.

124. *Id.* at 1147.

2. *The Delaware Supreme Court Upheld the Court of Chancery Decision*

The Delaware Supreme Court affirmed the Court of Chancery's judgments.[125] As a preliminary matter, the court addressed Martin Marietta's assertion that the Court of Chancery converted the confidentiality agreements into a standstill agreement.[126] The court explained that confidentiality agreements typically do not prevent a party from making a hostile bid, and that confidentiality agreements are intended to protect non-public information, not a company's corporate control or ownership.[127] "It is undisputed," the court continued, "that the Confidentiality Agreements in this case were true confidentiality agreements, not standstill agreements. They did not categorically preclude Martin from making a hostile takeover bid for Vulcan. What they did was preclude Martin from using and disclosing Vulcan's confidential, nonpublic information except insofar as the agreements themselves permitted."[128]

The Court concluded that the Chancery Court was correct in holding:

> (i) [T]he JDA prohibited Martin from using and disclosing Vulcan Confidential Materials to conduct its hostile bid; (ii) the NDA prohibited Martin from disclosing Vulcan Evaluation Material without affording Vulcan pre-disclosure notice and without engaging in a vetting process; (iii) Martin breached the use and disclosure restrictions of the JDA and the disclosure restrictions of the NDA; and (iv) injunctive relief in the form granted was the appropriate remedy for those adjudicated contractual violations.[129]

Because it affirmed the judgments on these grounds, the court did not address the Chancery Court's other bases for contractual violations, including Martin Marietta's breach of the use provisions of the NDA by using confidential material in deciding whether to launch its hostile bid because it was not a negotiated transaction "between" the parties.[130] In declining to address this issue, the Delaware Supreme Court missed an opportunity to resolve the question of whether "between" unequivocally indicates a negotiated deal, as the Canadian court in *Certicom* decided, or whether the Court of Chancery's determination that it may be subject to ambiguity was correct.

In reviewing the Chancery Court's determination that Martin Marietta violated the disclosure restrictions of the NDA, the court

125. *Martin Marietta II*, 68 A.3d 1208, 1210 (Del. 2012).
126. *Id.* at 1218–19.
127. *Id.* at 1219.
128. *Id.*
129. *Id.* at 1218.
130. *Id.*

declined to reach the merits of the factual, ambiguity-based analysis, and instead made several conclusions based on the NDA's "unambiguous" terms as a matter of law.[131] Thus, the court did not look to any extrinsic evidence to interpret the contract.

First, the court concluded that Paragraph 3, which provided the exception for legally required disclosures, did not authorize disclosure of evaluation material even if otherwise "legally required."[132] The court explained: "Evaluation Material does not fall with Paragraph 3's 'legally required' carve-out exception, because that exception can *only* apply to the confidential information specifically identified in Paragraph 3."[133] Second, the court found that Paragraph 4[134] was the only provision that authorized disclosure of evaluation material, and only in response to an external demand and after complying with the notice and vetting process.[135] Finally, the court concluded that Martin Marietta violated the use restrictions of the NDA because no external demand was made and Martin Marietta did not follow the notice and vetting process prior to making its disclosures.[136]

In upholding the injunctive remedy, the court regarded the parties' stipulation in the NDA that "money damages would not be [a] sufficient remedy for any breach" as a stipulation to irreparable injury.[137] The court accepted the Chancery Court's balancing of Vulcan's need to vindicate its "reasonable [contractual] expectations" against the delay imposed on Martin Marietta.[138] In upholding the Chancery Court's remedy, the Delaware Supreme Court enforced a "backdoor" standstill agreement[139] while declining to use an ambiguity-based analysis.

C. Reading Standstills into Standard Confidentiality Agreements

The effect of these decisions has been to enforce confidentiality agreements as standstills, creating a dissonance between how early M&A agreements are drafted and how they are enforced. The *Certicom* and *Martin Marietta* decisions demonstrate how broad judicial interpretation and enforcement of confidentiality agreements creates backdoor standstill agreements. This Subpart examines the implications of these decisions and the difficulties they present.

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131. *Id.* at 1223.
132. *Id.* at 1223–24.
133. *Id.* at 1224.
134. Paragraph 4 established the notice and vetting process for "Required Disclosures." *Id.* at 1212.
135. *Id.* at 1224–26.
136. *Id.* at 1226.
137. *Id.*
138. *Id.* at 1227 (alterations in original).
139. *See Martin Marietta I*, 56 A.3d 1072, 1135 (Del. Ch. 2012).

1. Implications of the Martin Marietta *Decisions*

The *Martin Marietta* courts' injunction of the hostile bid as the remedy for breach effectively enforced a standstill agreement, not a confidentiality agreement. The parties did agree that money damages would not be a sufficient remedy for a breach, but an injunction on a hostile bid is not the remedy for breach of a duty not to disclose confidential information.[140] A proper remedy for a breach of duty not to disclose would be an injunctive order to cease disclosure and refrain from further disclosing the confidential information.[141] Instead, these courts have issued an injunction against a breach of a duty to not make a hostile bid, something the Delaware Supreme Court explicitly stated it did not do.[142] Although the Delaware Supreme Court claimed that interpreting the NDA and JDA in this way did not create a standstill, in practice there is no way that Martin Marietta would have been able to pursue the hostile bid while still conforming to SEC disclosure requirements.[143]

The Delaware Supreme Court, in declining to discuss whether the "between" language of the NDA prohibited Martin Marietta from using confidential information in contemplation of its hostile bid, ignored an opportunity to either reject or endorse the Chancery Court's acceptance of the definition of "between" meaning only a negotiated, consensual deal.[144] In doing so, the Delaware Supreme Court left this issue unresolved, leaving practitioners to wonder whether future Delaware courts will determine that "between" unequivocally indicates a negotiated deal, as in *Certicom*, or whether it may be subject to ambiguity, as the Court of Chancery determined.[145]

2. Difficulties with this Approach

This recent trend of broad interpretation of the powers of confidentiality agreements may create results that are unfair to parties and

140. *See* RESTATEMENT (SECOND) OF CONTRACTS § 357 ("[A]n injunction *against breach of a contract duty* will be granted in the discretion of the court against a party who has committed or is threatening to commit a breach of the duty if (a) the duty is one of forbearance." (emphasis added)).

141. *See* RESTATEMENT (SECOND) OF CONTRACTS § 357 cmt. b ("[T]he performance due under the contract consists simply of forbearance, and the injunction in effect orders specific performance.").

142. *See Martin Marietta II*, 68 A.3d at 1214, 1219 ("It is undisputed that the Confidentiality Agreements in this case were true confidentiality agreements, not standstill agreements. They did not categorically preclude Martin from making a hostile takeover bid for Vulcan.").

143. *See, e.g.*, 17 C.F.R. § 239.25 (2013) (requiring disclosure of "any past, present or proposed material contracts, arrangements, understandings, relationships, negotiations or transactions" via Form S-4, Item 6); *id.* § 229.1005 (requiring disclosure of any "negotiations, transactions or material contacts"). The *Certicom* court, though skeptical of the feasibility of such action, still allowed in its remedy the potential to launch a subsequent hostile bid without breaching the agreements. Certicom Corp. v. Research in Motion Ltd. (2009), 94 O.R. 3d 511, at para. 97 (Can. Ont. Sup. Ct. J.).

144. *See Martin Marietta II*, 68 A.3d at 1223.

145. *See Certicom*, O.R. 3d 511 at para. 53; *Martin Marietta I*, 56 A.3d 1072, 1117 (Del Ch. 2012).

their shareholders. Confidentiality agreements are often the first agreements negotiated in preliminary dealings between parties.[146] Broad readings of these early agreements prevent future action that was not contemplated by the parties and may create separate agreements that were or were not separately contemplated.[147] By reading standstill agreements into standard confidentiality agreements, companies are prevented from seeking a noncontractual merger, even if that was not their intention in drafting.

Standstill agreements are generally separately negotiated to have a specific term.[148] The current trend in judicial interpretation enforces a backdoor standstill provision from standard NDAs with no separate expiration date. In *Certicom*, for example, where the parties negotiated a separate standstill, the court created another permanent standstill through the remedy it imposed for the breach of the confidentiality agreements.[149] Thus, Certicom received the benefit of a permanent standstill agreement after its negotiated standstill period had expired.

Standstills mostly protect the incumbent management to the detriment of shareholders who would have had an opportunity to review the facts under the Williams Act disclosure requirements.[150] Hostile tender offers make up only a small percentage of all tender offers, and tender offers comprise an even smaller percentage of all acquisitions.[151] Thus, the broad, board-protecting interpretation of confidentiality agreements is unwarranted. These court decisions have allowed the terms of standard confidentiality agreements to take over territory that is generally occupied by separately negotiated standstill agreements. This

146. AM. BAR ASS'N, *supra* note 8, at 4.

147. Reading confidentiality agreements broadly has ramifications outside of the context of preventing hostile takeovers. In *Goodrich Capital, LLC v. Vector Capital Corporation*, the U.S. District Court for the Southern District of New York did not dismiss a breach of contract claim based on an alleged violation of a confidentiality agreement's use restriction. No. 11-9247, 2012 WL 4123401, at *7 (S.D.N.Y. June 25, 2012). Goodrich, the target, alleged that Vector, a potential buyer, used information provided by Goodrich to evaluate a different target in the same industry. *Id.* at *3 Because Goodrich had provided Vector with the name of Vector's ultimate target, the court allowed Goodrich's claim for breach of the use restriction to survive Vector's motion to dismiss. *Id.* Though only at the Federal Rule of Civil Procedure 12(b)(6) stage, this ruling indicates the judicial attitude toward broad interpretation of confidentiality agreements. If Goodrich's claims succeed, the result would be that potential buyers, as a party to a confidentiality agreement with a potential target, could be restricted from pursuing an unrelated transaction with a different target in the same industry. *See* Hendrik F. Jordan et al., *Confidentiality Agreements Matter—Three Recent Cases Impacting Private Equity Transactions*, MORRISON & FOERSTER LLP (2012), http://www.mofo.com/files/Uploads/Images/120716-Confidentiality-Agreements.pdf.

148. Climan et al., *supra* note 14, at 637.

149. *See Certicom*, 94 O.R. 3d 511, at para. 97.

150. *See* KLEIN ET AL., *supra* note 1, at 202–03 (discussing the use of defensive tactics raising suspicion that incumbent managers are trying to save their jobs rather than serve the shareholders to whom they owe a fiduciary duty).

151. *Id.* at 197.

may result in difficulties for drafters of confidentiality agreements, including the increased need for lawyers to spend time on these early negotiations.[152]

IV. The Traditionalist vs. Contextualist Interpretation of "Backdoor Standstills"

This Part examines a hypothetical situation, altering the facts of the *Martin Marietta* case and demonstrating how courts using the competing traditional and contextual approaches to contract interpretation would result in different outcomes. In this test suite, this Note intends to show how the contextualist approach creates a result that is more in line with the intent of the parties.

The modified facts are as follows: Martin Marietta and Vulcan, in preliminary negotiations, decided to enter into confidentiality agreements while evaluating whether to effectuate a merger. Contemporaneously, Nye, Martin Marietta's CEO, insisted on a separate standstill agreement with a term of two years. Vulcan resisted this arrangement but eventually agreed, and the executed standstill agreement provided that neither party would try to buy the other on an unsolicited basis, buy each others' securities in the open market, or make an otherwise hostile offer to buy the other company until the standstill agreement expired in two years.

The language used in the confidentiality agreements—the NDA and the JDA—was boilerplate, taken from the form of an earlier confidentiality agreement between the two companies. The final NDA and JDA were consistent, defining "Transaction" as "a possible business combination transaction between Martin Marietta and Vulcan or one of their respective subsidiaries." The agreements provided that the confidential material was to be used "solely for the purpose of evaluating a Transaction."

The disclosure restrictions stated that the fact of the negotiations as well as the confidential material could not be disclosed unless legally required. This exception was not made explicitly subject to the following section, entitled "Required Disclosures," which established a notice and vetting process in which requests for information from an external demand, such as a subpoena or civil investigation, must be forwarded to the other party and receive approval. The NDA had a term of five years and the JDA had an indefinite term. The agreements provided that money damages would not be a proper remedy for a breach and the non-breaching party would be entitled to equitable relief for a breach.

152. Major law firms have alerted clients that confidentiality agreements "will likely be more heavily negotiated in light of recent decisions," to "beware of unintended consequences when entering into [confidentiality agreements]," and that "slight variances in defined terms[] could significantly impact your bargained-for protections." Jordan et al., *supra* note 147.

Merger negotiations between Martin Marietta and Vulcan soured, and a friendly merger agreement was never reached. Two years later, once the standstill agreement expired, Vulcan decided to launch a tender offer to Martin Marietta's shareholders and filed a Schedule TO with the SEC. In Item 5 of the Schedule TO, Vulcan disclosed the fact that it had been in negotiations with Martin Marietta regarding a potential merger, and that it had signed the confidentiality agreements. Vulcan also filed a Confidential Treatment Request under Rule 24-b, marking the relevant pages of the Item 5 disclosures with a request for confidential treatment. The SEC granted confidential treatment of the information for the remainder of the agreements' term.

Martin Marietta, in an attempt to block the hostile bid, sues Vulcan for breach of the NDA and the JDA, claiming that under the terms of the agreements: (1) Vulcan was not permitted to use confidential information other than for evaluation of a consensual, negotiated deal; (2) even if it were permitted to use the information in evaluating whether to launch a hostile bid or is found to have decided to launch its bid without considering confidential information, it breached the disclosure restrictions by makings its disclosures to the SEC; and (3) even if the disclosures fit within the exception for "legally required" disclosures, it failed to conform to the notice and vetting process.

This Note now turns to the traditionalist and contextual approaches to examine how courts using each approach would differ in their outcome in resolving this hypothetical case.

A. Traditionalist Approach

Under the traditionalist approach adopted by the Canadian court in *Certicom*, the definition of "transaction" unambiguously limits the use of confidential information to a contractual, negotiated deal between Vulcan and Martin Marietta.[153] The use of the word "between" means that the parties cannot use the information or disclose the negotiations unless in the context of a negotiated deal. Therefore, if the court found that Vulcan had used any confidential information to form its hostile bid, it would have breached the confidentiality agreements, even though the standstill agreement had expired.

Furthermore, under the Delaware Supreme Court's reading, the plain language of the agreements prohibits disclosures to anyone, including the SEC, unless in response to an external demand.[154] The line-item disclosures required by the SEC, which included the fact that the negotiations had taken place, were not in response to an external demand.[155] Accordingly,

153. *See Certicom*, 94 O.R. 3d 511, at para. 52–53.
154. *See Martin Marietta II*, 68 A.3d 1208, 1226 (Del. 2012).
155. *See id.*

Vulcan breached the agreements when it made these disclosures to the SEC, even though Vulcan requested that the information remain confidential under Rule 24b-2 and the SEC did not release the information to the public.[156] The court would find that Vulcan also failed to conform to the notice and vetting process.

Thus, under this approach, a court would find, without any further inquiry into the intent of the parties, that Vulcan breached the agreements when it launched its tender offer and made disclosures to the SEC. Similar to the remedy issued in *Martin Marietta*, the court would consider equitable relief, finding that, in the plain terms of the agreement, the parties stipulated that any breach constituted irreparable harm. The court would issue an injunction, prohibiting Vulcan from going forward with its hostile bid,[157] and Martin Marietta's current board would receive the benefit of a standstill it did not negotiate.

B. Contextualist Approach

Under the contextualist approach, the court would interpret the meaning of the agreements in light of all the circumstances.[158] Thus, the court could consider the fact that the parties used boilerplate language that did not necessarily put any emphasis on the words "between" and "legally required," and the fact that a separate standstill provision had been negotiated. Vulcan could proffer evidence that its CEO was reluctant to agree to a standstill, but eventually did because he expected that the restrictions would expire in two years, a shorter time period than the confidentiality agreements.

Even if the court believed that the agreement's language was unambiguous on its face, it would consider the extrinsic evidence explaining Vulcan's reasonable reading of the terms, which would be found to be in line with the parties' intent.[159] The court would likely find that the parties did not intend to create a backdoor standstill agreement from the boilerplate terms of the confidentiality agreements, especially because the parties negotiated a separate standstill agreement.

C. The Contextualist Approach is More in Line with the Parties' Intent

In such a case where the terms are similar but the history of the negotiations and the conduct behind the alleged breach are so different,

156. *See id.*

157. The minimum period of repose, as in *Martin Marietta*, would be about three years—the time between when the hostile bid was launched and the expiration of the Nondisclosure Agreement. If the court chose to enforce specific performance for the Joint Defense Agreement because it had an indefinite term, Vulcan would be permanently enjoined from launching its hostile bid.

158. *See* Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 442 P.2d 641, 645 (Cal. 1968).

159. *See* Wolf v. Superior Court, 8 Cal. Rptr. 3d 649, 655–56 (Cal. Ct. App. 2004).

it is apparent that constraining the courts to the plain language of the contract may produce unintended results. In the hypothetical in this Note, both parties arguably understood that only the standstill agreement prohibited the parties from launching a hostile bid. The parties negotiated these standard confidentiality agreements early on and, as is standard practice for M&A lawyers, the protections of the standstill agreement were separately negotiated.[160] Neither party had negotiated the confidentiality agreements to have the effect of a standstill agreement. If they had, the standstill agreement they signed would have no purpose.

Refusing to look outside the plain language of the document creates a contradiction between the intent of the parties and the words on the page. It is inconsistent to have an agreement that creates a backdoor standstill if there was no negotiated standstill provision, or a negotiated standstill provision with a different term, as in *Certicom* and the hypothetical case. This discrepancy cannot be reconciled by simply declaring, as *Certicom* and the Delaware Supreme Court in *Martin Marietta* do, that the words "between" or "legally required" are all it takes to make a standstill last as long as the term of the confidentiality agreement. Putting the force of entire agreements into a few words is unsatisfying to the parties and frustrates the purpose of confidentiality agreements and the practical circumstances in which they are usually drafted.

Even courts adopting the traditionalist approach should take into consideration the practical effects of the language in determining whether there is ambiguity. Even under the traditionalist approach, the role of the court is to uphold the intent of the parties.[161] The Delaware Court of Chancery in *Martin Marietta* read an ambiguity into the terms of the confidentiality agreements, thus allowing extrinsic evidence to interpret the contract. Courts in traditionalist jurisdictions that adopt a more lenient reading, such as the Court of Chancery, will allow more evidence of the parties' intent to shape their interpretations and thus are more likely enforce contracts as the parties themselves intended.

Conclusion

Merger negotiations create the need to exchange confidential information. To protect this information from misuse and unwanted disclosure, parties to a merger negotiation, if well advised, always enter into confidentiality agreements. Practitioners also often negotiate for separate standstill agreements, precluding the parties from launching a hostile bid.

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160. *See* Climan et al., *supra* note 14, at 641–642.
161. Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d 728, 739 (2005).

The recent decisions in *Certicom* and *Martin Marietta* blurred the line between confidentiality agreements and standstills and, through their interpretation and enforcement of confidentiality agreements and their injunctive remedies, have created separate standstill agreements out of the words "between" and "legally required." Examining the competing approaches to contractual interpretation illuminates the need for extrinsic evidence of the intent of the parties to evaluate whether these "backdoor" standstills were intended. The traditionalist approach, allowing a court to interpret the contract's language by its understanding of "plain meaning," can create unwanted results. The contextualist approach allows for a greater understanding of the actual intent of the parties to determine whether certain words were intended to carry as much weight as these courts have recently placed upon them.