CONFIDENTIALITY AGREEMENTS AND LETTERS OF INTENT

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NOTE:

AS A BASIS FOR SOME OF THE MATERIALS IN THE APPENDICES INCLUDED HEREIN, THE AUTHOR HAS UTILIZED PORTIONS OF A PRE-PUBLICATION DRAFT OF THE MODEL ASSET PURCHASE AGREEMENT WITH COMMENTARY PREPARED PRIOR TO 2001 BY THE ASSET ACQUISITION AGREEMENT TASK FORCE OF THE MERGERS & ACQUISITIONS COMMITTEE OF THE AMERICAN BAR ASSOCIATION, TOGETHER WITH CERTAIN OTHER MATERIALS PREPARED FOR COMMITTEE PROGRAMS. THE MODEL ASSET PURCHASE AGREEMENT, AS FIRST PUBLISHED BY THE AMERICAN BAR ASSOCIATION, DIFFERS IN A NUMBER OF RESPECTS FROM THE DRAFT ON WHICH THESE MATERIALS WERE BASED. FURTHER, AS THE AUTHOR HAS UPDATED THESE MATERIALS TO REFLECT CASES, LEGISLATION, MARKET CHANGES AND OTHER DEVELOPMENTS SUBSEQUENT TO THE PUBLICATION OF THE MODEL ASSET PURCHASE AGREEMENT, THE DIVERGENCE OF THESE MATERIALS FROM THE MODEL ASSET PURCHASE AGREEMENT HAS INCREASED. THE AUTHOR EXPRESSES APPRECIATION TO THE MANY MEMBERS OF THE MERGERS & ACQUISITIONS COMMITTEE WHOSE CONTRIBUTIONS HAVE MADE THESE MATERIALS POSSIBLE. THESE MATERIALS, HOWEVER, ARE SOLELY THE RESPONSIBILITY OF THE AUTHOR AND HAVE NOT BEEN REVIEWED OR APPROVED BY THE MERGERS & ACQUISITIONS COMMITTEE.

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I. CONFIDENTIALITY AGREEMENT

A confidentiality agreement (***"Confidentiality Agreement"***), also sometimes called a non-disclosure agreement (***"NDA"***), is typically the first stage for the due diligence process as parties generally are reluctant to provide confidential information to the other side without having the protection of a confidentiality agreement.[1] The target typically proposes its form of confidentiality agreement, and a negotiation of the confidentiality agreement ensues.[2] A seller's form of confidentiality agreement is attached as **Appendix A**.[3]

A. NDA As Effective Standstill Agreement. In *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*,[4] the Delaware Supreme Court upheld a pair of confidentiality agreements and temporarily enjoined Martin Marietta Materials from prosecuting a proxy contest and proceeding with a hostile bid for its industry rival Vulcan Materials Company. After years of

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Further information relevant to the topics discussed herein can be found in Byron F. Egan, EGAN ON ENTITIES: *Corporations, Partnerships and Limited Liability Companies in Texas* available on Amazon.com. You can CLICK HERE to purchase EGAN ON ENTITIES.

1 Byron F. Egan, *Confidentiality Agreements Are Contracts With Long Teeth*, 46 Tex. J. Bus. Law 1 (Fall 2014).

2 Some confidentiality agreements contain covenants restricting activities of the buyer after receipt of confidential information. *See, e.g., Goodrich Capital, LLC and Windsor Sheffield & Co., Inc. v. Vector Capital Corporation*, 11 Civ. 9247 (JSR), 2012 U.S. Dist. Lexis 92242, at *2 (S.D.N.Y. June 26, 2012) (NDA required use of confidential information solely to explore the contemplated business arrangement and not to minimize broker's role or avoid payment of its fees; a prospective bidder used information provided about other comparable companies to acquire one of the other companies; broker's lawsuit against that prospective bidder for breach of contract for misusing confidential information survived motion to dismiss); *In re Del Monte Foods Company Shareholders Litigation*, 25 A.3d 813 (Del. Ch. 2011) (NDA restricted bidders from entering into discussions or arrangements with other potential bidders; in temporarily enjoining stockholder vote on merger because target was unduly manipulated by its financial adviser, Delaware Vice Chancellor Laster faulted bidders' violation of the "no teaming" provision in the confidentiality agreement and the target's Board for allowing them to do so); *see* discussion of *Del Monte* case in Byron F. Egan, *How Recent Fiduciary Duty Cases Affect Advice to Directors and Officers of Delaware and Texas Corporations*, pp. 289-297 (Feb. 13, 2015), http://www.jw.com/publications/article/2033.

3 *See* **Appendix B**, *infra*. *See also* Article 12 of the ABA Model Asset Purchase Agreement and the Model Confidentiality Agreement accompanying the ABA Model Public Company Merger Agreement.

4 68 A.3d 1208, 1212 (Del. 2012), affirming *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 56 A.3d 1072 (Del. Ch. 2012). *See* XVII Deal Points (The Newsletter of the Mergers and Acquisitions Committee of the ABA Bus. L. Sec.) at 23-26 (Summer 2012).

communications regarding interest in a friendly transaction, Vulcan and Martin Marietta in the spring of 2010 executed two confidentiality agreements to enable their merger and antitrust discussions, each governed by Delaware law:

- A general non-disclosure agreement requiring each party to use the other's confidential information "solely for the purpose of evaluating a Transaction," which was defined as "a possible business combination transaction . . . between" the two companies, and prohibiting disclosure of the other party's evaluation material and of the parties' negotiations except as provided in the agreement, which had a term of two years.

- A joint defense and confidentiality agreement, intended to facilitate antitrust review signed about two weeks after the non-disclosure agreement requiring each party to use the other's confidential information "solely for the purposes of pursuing and completing the Transaction," which was defined as "a potential transaction being discussed by" the parties, and restricting disclosure of confidential materials.

Neither agreement contained an express standstill provision. When the agreements were signed, both parties were seeking to avoid being the target of an unsolicited offer by the other or by another buyer. Accordingly, the agreements protected from disclosure the companies' confidential information as well as the fact that the parties had merger discussions.

After negotiations for a consensual transaction had floundered and Martin Marietta's economic position had improved relative to Vulcan, Martin Marietta decided to make a hostile bid for Vulcan and also launched a proxy contest designed to make Vulcan more receptive to its offer. The Court found that Martin Marietta used protected confidential material in making and launching its hostile bid and proxy contest.

The Court then construed the language of the confidentiality agreements to determine that Martin Marietta had breached those agreements by (1) using protected information in formulating a hostile bid, since the information was only to be used in an agreed-to business combination; (2) selectively disclosing protected information in one-sided securities filings related to its hostile bid, when such information was not disclosed in response to a third-party demand and when Martin Marietta failed to comply with the agreements' notice and consent process; and (3) disclosing protected information in non-SEC communications in an effort to "sell" its hostile bid. The Court emphasized that its decision was based entirely on contract law, and its reasoning did not rely on any fiduciary principles.

The Court held that, although the confidentiality agreements did not expressly include a standstill provision, Martin Marietta's breaches entitled Vulcan to specific performance of the agreements and an injunction. The Court therefore enjoined Martin Marietta, for four months, from prosecuting a proxy contest, making an exchange or tender offer, or otherwise taking steps to acquire control of Vulcan's shares or assets.

B. <u>"Don't Ask, Don't Waive" Provisions</u>. Some NDAs do contain express standstill provisions that (i) prohibit the bidder from making an offer for the target without an express invitation from its board of directors (***"Board"***) and (ii) preclude the bidder from publicly or

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