IN THE

Supreme Court of the State of Delaware

MARTIN MARIETTA MATERIALS, INC.,
Plaintiff/Counterclaim Defendant Below-Appellant,

v.

VULCAN MATERIALS COMPANY,
Defendant/Counterclaim Plaintiff Below-Appellee.

No. 254, 2012

COURT BELOW:

COURT OF CHANCERY OF
THE STATE OF DELAWARE,
C.A. NO. 7102-CS

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May 21, 2012

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NATURE OF THE PROCEEDINGS

This is a breach-of-contract case between two producers of construction aggregates: Vulcan Materials Company, a New Jersey corporation, and Martin Marietta Materials Company, a North Carolina corporation.

In May 2010, Vulcan and Martin began friendly talks to evaluate a negotiated merger. They entered into the two contracts at issue here, a Non-Disclosure Agreement (the "NDA," attached hereto as Ex. A), and a Joint Defense, Common Interest and Confidentiality Agreement (the "JDA," attached hereto as Ex. B). The contracts were designed to facilitate the exchange of nonpublic information in support of the parties' discussions and to ensure that neither company would be put in play by public disclosure of the talks. These two objectives were identified in the initial face-to-face meeting of the CEOs. To achieve the first objective, both contracts limited the use and disclosure of the other company's nonpublic information. To achieve the second objective, the NDA specifically prohibited disclosure of the fact and substance of the discussions, as well as all confidential information exchanged between the parties, subject to a narrow exception for legally "required disclosures."

Senior management of the two companies shared nonpublic information and negotiated a potential friendly merger for more than a year. Then, in December 2011, without warning to Vulcan, Martin publicly announced a hostile takeover bid for Vulcan: an exchange offer to acquire Vulcan shares from Vulcan's stockholders, and a proxy contest to unseat the Vulcan directors who were up for election. Martin used Vulcan's nonpublic information to evaluate and then promote this hostile bid. Martin also disclosed to the public, in detail, Vulcan's nonpublic information as well as the negotiations between the parties. When it announced its bid, Martin sued for a declaration that it did not violate the NDA. Vulcan counterclaimed, alleging breach of the NDA and the JDA.

After a four-day trial, the Court of Chancery held that Martin violated both the NDA and the JDA by using Vulcan's nonpublic information in service of its hostile bid, and by disclosing Vulcan's information to the public. The court held that Martin had also violated the NDA by publicly disclosing the fact and history of the negotiations. *See* Opinion ("Op."), Exhibit A to Martin's opening brief in this Court ("Br."). The court entered a final judgment enjoining Martin for four months from prosecuting a proxy contest, making an exchange or tender offer, otherwise taking steps to acquire control of Vulcan shares or assets, or further violating the NDA and the JDA. *See* Judgment, Exhibit B to Br. The four months reflect the minimum period of Martin's breach, from December 2011, when it announced its bid, through April 2012, when this case was submitted to Chancery for decision. This is Martin's appeal from that judgment.

SUMMARY OF ARGUMENT

1. Denied. The Chancellor correctly construed the NDA and the JDA. The NDA prohibited Martin's use of Vulcan's nonpublic information ("Evaluation Material") except to evaluate a "business combination transaction between [Martin] and [Vulcan]." The JDA imposed a parallel restriction on Martin's use of "Confidential Materials," except to evaluate the "possible transaction being discussed" between the parties. Both contracts prohibited disclosure of confidential information. And the NDA, in paragraph (3), imposed a separate and further restriction on disclosing the fact and substance of the negotiations, and even the existence of the NDA ("Transaction Information"). The Chancellor thought Vulcan's interpretive approach to the NDA was the "most natural[]" one, "more reasonable" than Martin's because it "harmonizes all the relevant provisions" of the NDA. Op. 98. In contrast, he found Martin's interpretive approach "odd," Op. 101—it presented "awkward definitional and contextual problems," Op. 73, was "a bit of a stretch," Op. 79, and required "substantial strain," Op. 92. The court nonetheless gave Martin the benefit of the doubt by treating the NDA as ambiguous, and accordingly proceeded to examine the extrinsic evidence to resolve any possible ambiguity. After carefully examining the extensive record, the court found that "the drafting history," "the business context," and the "expressed expectations" of the parties' CEOs, "make[] clear that Vulcan's interpretation . . . is correct." Op. 81-88, 102-10.

The Chancellor held that Martin breached the two contracts in five different ways: by disclosing Vulcan's Evaluation Material in violation of the NDA; by disclosing Vulcan's Confidential Materials in violation of the JDA; by using Vulcan's Evaluation Material in violation of the NDA; by using Vulcan's Confidential Materials in violation of the JDA; and by disclosing Transaction Information in violation of the NDA. Any one of these breaches alone justifies the Chancellor's injunction, and to win on this appeal, Martin must show that the Chancellor got none of these five conclusions right.

Martin only addresses three of these five breaches. Martin presents *no challenge whatsoever* to the Chancellor's conclusion that Martin improperly disclosed Evaluation Material under the NDA, or to his conclusion that Martin improperly disclosed Confidential Materials under the JDA. As a result, the correctness of those holdings is conceded, and the judgment of the Chancellor must be affirmed. (*See infra* at 12-13.)

On the grounds it does challenge, Martin argues that the Chancellor erroneously declined to view the two contracts as *unambiguous* in its favor—that is, Martin argues both that "Transaction" in the NDA and the JDA included *unam-*

biguously the right for each side to go hostile using the other's confidential information; and that paragraph (3) of the NDA *unambiguously* provided Martin the right to disclose Transaction Information via the self-created expedient of launching a hostile exchange offer, without regard to the specific limitations on legally "required" disclosures in paragraph (4) to which paragraph (3) is "[s]ubject." Accordingly, to reverse on the merits, this Court would have to excuse Martin's waiver ***and*** reach ***all*** of the following conclusions:

> (1) Vulcan's interpretation of the words "business combination transaction between Martin and Vulcan"—as referring to a friendly deal "between" the companies—is unreasonable as a matter of law (even though this is precisely the same interpretation reached in a nearly identical case) (*see infra* at 14-20);
>
> (2) The Chancellor erred in finding that the JDA's definition of "Transaction"—the "transaction being discussed" between the parties—cannot be read to include a hostile transaction, even though the facts show that the only "transaction being discussed" was a friendly deal (*see infra* at 21-22);
>
> (3) Vulcan's interpretation of Paragraph (4) of the NDA—that it governs Martin's claim that its disclosure of Transaction Information was "legally required"—is unreasonable as a matter of law (even though that paragraph is entitled "Required Disclosures" and sets out the procedure for "legally required" disclosures) (*see infra* at 23-26); *and*
>
> (4) All of Martin's gratuitous tactical disclosures of Transaction Information were compelled by law. (*See infra* at 26-28.)

The Court would also have to address and reject Vulcan's alternative argument, not resolved by the Chancellor, that a party cannot create its own legal requirement to excuse a breach. (*See infra* at 29.)

Martin's contention that its plain breaches of the NDA and the JDA should be unremediable because those agreements do not contain a standstill is without support and contrary to elementary contract law. Martin cannot escape compliance with the contracts it did sign because its conduct would also be impermissible under other contracts it did not sign. (*See infra* at 17-18, 26, 34.)

2. Denied. The Chancellor correctly applied settled principles of contract interpretation. He examined the four corners of the contracts and inquired what "a reasonable person in the position of the parties would have thought the language of [the contracts] means." *Lorillard Tobacco Co.* v. *Am. Legacy*

Found., 903 A.2d 728, 739 (Del. 2006). Finding that Vulcan's interpretations were more persuasive but that Martin's alternatives could not be eliminated as entirely unreasonable, the Chancellor reviewed the extrinsic evidence, just as our law requires. The court considered relevant principles and canons of interpretation, and concluded that the contracts were not intended to allow one party to press upon the other "a gunpoint transaction entered into after an unsolicited exchange offer and proxy contest." Op. 87.

3. Denied. Martin mischaracterizes the Chancellor's decision. Nowhere does the Chancellor "requir[e] parties to identify all affirmative actions that may be taken." Br 2. The point of contracts is to create enforceable obligations, including obligations to refrain from acting. Martin's position in this case is that it should be excused from its contractual obligations. Such a result is unwarranted.

4. Denied. Martin again mischaracterizes Chancery's decision. The Chancellor held, as a matter of fact unchallenged here, that Martin "viewed the SEC requirements as an opportunity to work with its public relations flacks on a propaganda piece." Op. 123. The Chancellor also found, again as a matter of fact unchallenged here, that Martin's disclosures were driven by its own self-interested tactical expediency—not legal compulsion. And Martin repeated its disclosures, again and again, in investor presentations, off-the-record discussions with reporters, and analyst calls—all undeniably not legally required, but designed to push its takeover bid. Op. 127-28.

5. Denied. The Chancellor correctly ordered injunctive relief. That Martin *agreed* to such relief in the NDA and the JDA is sufficient. And even if Martin had not so agreed, an injunction was warranted: the Chancellor found, as a factual matter based on the record, that Vulcan had suffered—and in the absence of an injunction would continue to suffer—irreparable harm, including the loss of negotiating leverage, distraction of management, and also the harm of having its own confidential information used against it in a hostile campaign, which is "hard to measure, but difficult for any objective mind to deny as real." Op. 134-35. Balancing the equities, the court found that the limited, four-month injunction that Vulcan had requested was a measured remedy when "an argument can be made that a longer injunction would be justified by the pervasiveness of Martin Marietta's breaches." Op. 137. Indeed, Martin has confirmed the limited effect of the court's remedy, when it declared that it "intend[s] to continue [its] efforts to combine with Vulcan . . . as soon as [it is] permitted to do so." B541. Martin's position boils down to an assertion that its breaches should go entirely unremedied. That defies our law and would reduce M&A confidentiality agreements to mere tissue paper. (*See infra* at 30-34.)

STATEMENT OF FACTS

The Court of Chancery's findings of fact rest on a record of more than 800 exhibits and the testimony of 16 witnesses, a four-day trial, five rounds of briefing, and a full day of argument. The Chancellor's key factual findings are summarized below.

I. Martin and Vulcan Explore a Negotiated Transaction.

Vulcan and Martin restarted long-dormant merger talks in early 2010. Ward Nye had just been installed as Martin's CEO and was "nervous and excited at the prospect of a Vulcan-Martin Marietta merger." Op. 11. He had spent years pursuing his position, and "had no taste for being supplanted as a public company CEO after only months in the job." Op. 11. Nye was mindful that Martin's recent friendly talks with a European company had turned hostile, and Martin found itself "the target of a hostile takeover attempt," which it escaped "only because the financial crisis cratered the bidder's financing." Op. 11.

At the same time, Nye believed it was an advantageous time from Martin's viewpoint to negotiate a deal: he "knew that Vulcan was very strong in states hard hit by the financial crisis, such as Florida and California, and that the coming years would be good ones in which to merge, before those markets recovered and with it, Vulcan's financial results and stock price." Op. 12. Nye also knew that James was approaching retirement age with no obvious successor, meaning "that the timing was right for a combination whereby Nye would end up as CEO." Op. 12. So Nye was willing to engage with Vulcan, "only if he could get assurances to calm his nerves about the possibility that leaked discussions would end up putting Martin Marietta in play." Op. 12.

II. Martin Insists on Confidentiality Protections.

James and Nye met in person in April 2010. The two CEOs agreed that their talks had to remain completely confidential and that any information the companies shared could be used only to facilitate a friendly deal. Op. 12-13.

Nye was concerned—to the point of "obsession"—about confidentiality and a possible hostile overture. Op. 13. When Nye spoke to Vulcan's banker at Goldman Sachs in April 2010, he stressed that Martin was "<u>not for sale</u>" and that Martin was "interested in discussing [] the prospect of a merger, but not an acquisition whether by [Vulcan] or otherwise." A763 (emphasis in original); Op. 14. He told Vulcan's banker that "[a]s a threshold matter, it's obviously critical that for anything to happen, all of our communications, and all of yours with [James], be kept completely confidential," A763 (emphasis omitted); Op. 14, and

insisted again that "maximum confidentiality [about any merger talks] needs to be maintained" by both James and Vulcan's banker. A763. Then, when Nye met with James, he again "emphasized the need for confidentiality." Op. 12. Nye told James that "[s]tructurally, we think of this transaction, as I think [Vulcan does], as a modified 'merger of equals.'" A803; Op. 13. And when Nye reported to Martin's board, he recounted that he had "heavily underscored that confidentiality is critical." B274; Op. 14. Nye was clear: "(i) Martin Marietta would talk and share information about a consensual deal only, and not for purposes of facilitating an unwanted acquisition of Martin Marietta by Vulcan; and even then only if (ii) absolute confidentiality, even as to the fact of their discussions, was maintained." Op. 14. In short, "[a]s a condition of engaging in information sharing and negotiations, Nye put the kibosh on, vetoed, emphatically ruled out, and declared way out of bounds exactly what Martin Marietta is now doing and desired the NDA to protect that pre-condition." Op. 83.

III. Martin and Vulcan Negotiate the NDA to Ensure Secrecy and Protect Each Company's Nonpublic Information.

Nye and James thus "agreed upon the need for a confidentiality agreement to cloak any merger discussions between the companies and any information exchanged." Op. 12-13. Martin's general counsel, Roselyn Bar, prepared the first draft. Although Martin now claims that Nye had no role in the preparation of the NDA and the JDA, Br. 16, Nye testified at trial that he related to Bar the substance of his conversation with James and directed her to prepare appropriate confidentiality agreements. A142.

Bar's draft of the NDA was based on a prior agreement that Martin and Vulcan had executed in an asset-swap transaction. Op. 15.[1] Consistent with Nye's instructions, Bar's changes to the precedent "were unidirectional: every one of the proposed Martin Marietta changes had the effect of making the NDA stronger in the sense of broadening the information subject to its restrictions and limiting the permissible uses and disclosures of the covered information." Op. 15.

Prohibition on use except for a "Transaction." The NDA prohibits any "use" of "Evaluation Material" by either party "for purposes other than the evaluation of a Transaction." Op. 17. A "Transaction" is defined as "a possible

[1] Martin claims that the precedent contract involved three parties, Br. 4, but this is not true; it was between Martin and Vulcan only. A778.

business combination transaction [] between [Martin] and [Vulcan] or one of their respective subsidiaries." The precedent agreement had defined Transaction as a possible transaction "involving" Martin and Vulcan. A778; Op. 16. Bar added the words "business combination" and "replaced the looser term 'involving' and inserted a tighter term 'between' that is more easily read than 'involving' to require joint agreement of the two companies themselves." Op. 16-17.

"Evaluation Material." Bar expanded the definition of "Evaluation Material" in the NDA to protect not only "any nonpublic information furnished or communicated by the disclosing party," but also documents created by the "receiving party" on the basis of that information, including "all analyses, compilations, forecasts, studies, reports, interpretations, financial statements, summaries, notes, data, records or other documents . . . that contain, reflect, are based upon or are generated from any such nonpublic information." A778; Op. 16.

Defining Transaction Information. Paragraph (3) of the precedent, captioned "Non-Disclosure of Discussions," prohibited disclosure of "the fact that any Evaluation Material has been made available hereunder, that discussions or negotiations *are taking* place concerning a Transaction or any of the terms, conditions or other facts with respect thereto (including the status thereof)." A779 (emphasis added). "Not satisfied with [that provision], [Bar] added language [to the NDA] preventing the disclosure of the fact that discussions '*have* [been] taking place.' In other words, [she] sought to protect from disclosure that discussions had occurred in the past." Op. 17; A779. Bar also added a prohibition on disclosing even "that this letter agreement exists." A779. Bar thus broadened the definition of what the Chancellor called "Transaction Information."

Prohibition on Disclosure of Transaction Information. Bar added the words "Subject to paragraph (4)" at the beginning of paragraph (3) of the NDA. A779. By making paragraph (3) of the NDA "subject to" paragraph (4), Bar reinforced in plain English that any disclosure of the Transaction Information identified in paragraph (3), including any claimed "legally required" excuse, would be "subject to" the provisions and protections of paragraph (4). Op. 104-08.

Vulcan shared Martin's confidentiality concerns and agreed to Bar's changes. Op. 12-13.

IV. The Parties Sign the JDA to Provide Additional Protections.

Shortly after the NDA was signed, the companies' inside and outside counsel met to discuss antitrust concerns. Because these discussions implicated nonpublic and privileged information, and attorney work-product, the companies signed a joint-defense agreement to provide further protection. Op. 19.

The JDA, like the NDA, required that all "Confidential Materials" be "used . . . solely for purposes of pursuing and completing the Transaction." The JDA defined Confidential Materials to include "[a]ll factual information, documents, opinions, strategies or other materials exchanged or communicated by whatever means between or among the Parties or their Counsel."

The first draft of the JDA defined Transaction to mean "a transaction contemplated by Vulcan and Martin Marietta." Bar revised the definition to: "a *potential* transaction *being discussed* by Vulcan and Martin Marietta." B284 (emphasis added). And "[r]epeatedly throughout the JDA, it is made clear that Confidential Materials can only be used in aid of '*the* Transaction.'" Op. 19. The Chancellor found that "both parties engaged in communications and conduct evincing an understanding and desire that the information to be exchanged could only be used for purposes of considering a consensual, contractual business combination," Op. 20, and that "the record makes clear that the only transaction that was 'being discussed' at the time the parties entered into the JDA was a negotiated merger," Op. 86-87 ("There is no question that the one Transaction being discussed by the parties when they entered into the JDA was a negotiated one.").

V. Martin Uses Vulcan's Nonpublic Information to Assess Antitrust Risk and Synergies.

With the agreements in place, Vulcan provided nonpublic data that gave Martin a window into Vulcan's entire organization, showing Martin detailed confidential information about its business, revenues, personnel, and possible cost-cuts. *See, e.g.* B289-300, B311-78. Martin "had a genuine interest in learning more about Vulcan's operations and the costs and benefits of a merger." Op. 23. It needed Vulcan's nonpublic information to solve the two "gating issues" to a deal: likely antitrust-related divestitures and synergies. Op. 21.

At trial, Martin's witnesses denied in lock-step fashion that they used Vulcan's information (even as Martin argued such use was permissible). The Chancellor found this testimony "unconvincing and inconsistent with the conduct and internal writings of Martin Marietta's own management team." Op. 29.

Martin does not challenge on appeal Chancery's finding that Martin used Vulcan's nonpublic information in preparing its hostile bid. Br. 5.[2] Vulcan

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[2] While Martin says in its statement of facts that it "disputes that finding," it adds that "this Court need not resolve the factual dispute." Br. 5. In a footnote, Martin says that the Chancellor "inexplicably discounted the testimony of Martin

therefore refers this Court to the Chancellor's thorough exposition of the many ways in which Martin used Vulcan's nonpublic information in the course of evaluating, planning, and promoting its exchange offer and proxy contest. *See* Op. 20-53. This includes using Vulcan's information to analyze likely divestitures (Op. 47); to calculate likely synergies (Op. 42); and, ultimately, to tout its bid publicly by selectively disclosing the information that would "cast Vulcan's management and board in a bad light" and "make Martin Marietta's own offer look attractive," thereby "put[ting] pressure on Vulcan's board to accept a deal on Martin Marietta's terms" (Op. 53).

VI. Armed with Vulcan's Information, Martin Decides to Go Hostile.

After Martin baked Vulcan's nonpublic information into its antitrust and synergies analyses, Martin came to the view that the time was ripe not for the friendly deal that the parties had been discussing, but for a unilateral acquisition. After a "critical" March 8, 2011 meeting between Martin's and Vulcan's CFOs and controllers, Martin revised its synergies estimates to "*$100 million more annually*" than it had previously estimated. Op. 31-32 (emphasis in original). That jump "provided a basis to conclude that Martin Marietta could offer Vulcan stockholders a premium in a stock-for-stock exchange, and still justify the deal to Martin Marietta's stockholders." Op. 37. But if Martin wanted to realize those gains for itself, it had to move fast, because it knew that "Vulcan already had in mind plans to obtain costs savings" on its own. Op. 34. And so, after the March 8 meeting, Martin and its bankers began using Vulcan's information "to consider alternatives to a friendly deal." Op. 40. At a meeting on August 16-17, Martin's board authorized management to pursue these alternatives. Op. 40-41.

VII. Martin's Consciousness of Guilt.

In contrast to its litigating position that the NDA and the JDA unambiguously permit use of Vulcan's information in a hostile bid, Martin's conduct dem-

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Marietta's entrepreneurial Chairman [Zelnak] who explained how he readily was able to estimate synergies." No part of the Chancellor's ruling was inexplicable. The Chancellor found Zelnak's testimony "no doubt rehearsed," and "belied by [Zelnak's] own advice to Nye to be careful in this area," "the lack of any scrap of paper supporting" Zelnak's testimony, the fact that Martin's "internal [synergies] estimates were lower until it received nonpublic information from Vulcan in a March, 2011 meeting, and Zelnak's own reaction to the information from that meeting." Op. 27 n.58.

onstrates its belief that the contracts prohibited use for a hostile bid—just as the Chancellor found they in fact did.

Thus, from the first moment Martin asked its bankers to consider unfriendly alternatives, Martin "evinced uncertainty whether it could proceed with an unfriendly offer after signing the Confidentiality Agreements." Op. 40. Martin's banker at Deutsche Bank requested a copy of the NDA so that it could "'understand any limitations [the agreement] presents.'" Op. 40 (quoting B301).

Then, aware that its permitted use was limited to a consensual deal, Martin sought to "sanitize the record." Op. 42. The minutes of the August 16-17 board meeting, for instance, "are careful to note that Nye 'reviewed with the [b]oard management's calculations and estimates of potential cost synergies and savings resulting from a *business combination transaction* with [Vulcan], based on *publicly available information* and [Martin Marietta's] own cost-control platform.'" Op. 41 (quoting B309). The Chancellor found that this "odd locution" was "reflective of the glimpses the paper record gives into the extent to which Martin Marietta feared that it was disabled from using Evaluation Material in aid of its consideration of a hostile bid." Op. 41-42.

Even more telling is Bar's "clunky attempt to gather up all the Evaluation Material in the possession of Martin Marietta management and put [it] in a sealed box that she kept in her office." Op. 84-85. If, as Martin claims, the NDA and the JDA unambiguously permit use of Vulcan's confidential information in support of a hostile bid, Martin would have had no reason to "box up" Vulcan's information once it decided to go hostile. But that's exactly what it did. And while Martin "tried to sanitize, it did not do so well." Op. 42. The box did not hold critical documents containing Vulcan's nonpublic information. Op. 43. Bar also "told Martin Marietta's legal and financial advisors not to use any Evaluation Material." Op. 85. But again those "attempts to sequester the Evaluation Material were [] less than complete." Op. 43. In November, one of Martin's bankers "consulted a spreadsheet that . . . summariz[ed] the results of the [] March 8, 2011 meeting." Op. 43. Martin's "consciousness of its precarious legal position was illustrated by the email that banker received from her senior colleague, who passed on the spreadsheet—which clearly contained Evaluation Material—with the warning, '*I do not think that we can (or should) be using this information*.'" Op. 43-44 (quoting B383-84). The same went for Martin's antitrust lawyers, who at trial claimed "they followed Bar's instructions," but who in fact did not "destroy or segregate the old files," which "the lawyers were reading" as they updated their work. Op. 45-46.

VIII. Martin Discloses Nonpublic Information for Tactical Advantage.

Martin "was also tripping over itself as to whether the Confidentiality Agreements allowed it to go public with a hostile at all." Op. 48. A September draft of a bear hug letter addressed to Vulcan's board recited that Martin was "keeping [the letter] confidential and consistent with the terms and conditions of the non-disclosure agreement we entered into with you." B381; Op. 48.

Martin overcame its concern with compliance. As the evidence showed, Martin "wanted to put pressure on Vulcan publicly," Op. 48, and so, on December 12, Martin "blindside[d]" Vulcan and "spew[ed]" confidential information into the public domain. Op. 49. It announced that it would nominate directors at Vulcan's annual meeting. And it launched an exchange offer—the one hostile mechanism that carried a line-item requirement under federal securities law to disclose past negotiations. Simply running a proxy fight coupled with a public bear-hug letter would not have lent Martin any argument that the prohibited disclosures were legally required. Martin "viewed the SEC requirements [for exchange offers] as an opportunity to work . . . on a propaganda piece." Op. 123.

Martin's "disclosure decisions were heavily guided and influenced by public relations advisors, who advised Martin Marietta to portray Vulcan's decisions for not proceeding with a deal in a bad light." Op. 123. Martin's disclosures resulted from "a tactical decision influenced by its flacks"—as "is evident in the detailed, argumentative S-4 filed by Martin Marietta." Op. 50. There was no "rigorous, item-by-item review of what [Martin] should disclose"; Martin "dumped in whatever information . . . would help its case with the Vulcan electorate." Op. 123-24. And after filing its S-4, Martin took the position that "the floodgates could open and all of Vulcan's confidential information could come pouring out." Op. 127. Martin viewed the "SEC Rules as a license to disclose" Vulcan information, and it did so whenever advantageous: "in push pieces to investors, off the record and on the record communications to the media, and investor conference calls." Op. 127.

And so Martin, the party that had most insisted upon confidentiality, chose to blow through its contracts once it decided, using Vulcan's confidential information, that acquiring Vulcan was in Martin's interest.

ARGUMENT

I. MARTIN DOES NOT CHALLENGE TWO GROUNDS ON WHICH THE JUDGMENT RESTS

A. Question Presented

May this Court reverse the judgment of the Court of Chancery when the appellant does not challenge two independent grounds supporting that judgment (Op. 116-19)? This question was neither raised in nor considered by the Court of Chancery, as it arose when Martin filed its opening brief here.

B. Scope of Review

This is a legal question for the Court to decide in the first instance. *See, e.g.*, *Murphy* v. *State*, 632 A.2d 1150, 1152-53 (Del. 1993).

C. Merits of the Argument

1. The Court of Chancery held that Martin breached the NDA by revealing information protected as "Evaluation Material," and breached the JDA by revealing "Confidential Materials." Op. 116-19; *see also* Op. 49-50 (Martin disclosed "a host of details that constitute Evaluation Material under the Confidentiality Agreements").[3]

The Court of Chancery held that "[t]here is no non-frivolous dispute that Martin Marietta disclosed Evaluation Material covered by ¶ 2 of the NDA in [its] S-4 filing," including information based on Vulcan's nonpublic estimates of synergies. Before the Chancellor, Martin argued that even though the disclosure of Evaluation Material is prohibited in paragraph 2 of the NDA, disclosure was nevertheless permitted under paragraph 3 (which pertains only to Transaction Information). Op. 117. The Chancellor rejected that argument, holding that Evaluation Material "could only be disclosed if legally required within the meaning of ¶ 4 [of the NDA] and in conformity with" the procedures set forth in that paragraph—including advance notice. Op. 119. And, as "[n]either of those preconditions was satisfied," the court found a breach.

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[3] Although the court's decision hewed to the disclosure of Evaluation Material in the S-4 filing, the court also found that Martin disclosed such material "in numerous investor calls and presentations." Op. 52-53 & n.124. These disclosures were also in breach of contract.

Applying parallel reasoning, the court separately held that Martin's public disclosure of "Confidential Materials" breached the JDA. Op. 119. Much like paragraph (4) of the NDA, the JDA in paragraph (2) required Martin, before revealing that information publicly, to notify and "first obtain[] the consent of" Vulcan, and Martin did not do either. Op. 119.

2. Martin's opening brief does not challenge either of these holdings, which are independent of the Chancellor's other holdings of breach. As the Chancellor correctly held (Op. 117-19), Martin's assertion that its disclosure of Transaction Information was permissible under the NDA—as set forth at Br. 18-27, and addressed *infra* at 23-29—has no bearing on the permissibility of disclosing Evaluation Material under the NDA, and Martin does not on appeal assert otherwise. Nor does Martin's assertion that the NDA and the JDA are coextensive (Br. 28-29) in any way constitute a challenge to Chancery's holding that Martin impermissibly disclosed Confidential Materials in breach of the JDA. Even if the two agreements are coextensive, then the impermissibility of disclosing Evaluation Material under the NDA (which is unchallenged) implies that Confidential Materials cannot be disclosed publicly under the JDA. (In fact, the two agreements are not coextensive. *See infra* at 22.)

"The failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim on appeal." *Murphy*, 632 A.2d at 1152 (citing *Stilwell* v. *Parsons*, 145 A.2d 397, 402 (Del. 1958)); *accord M3 Healthcare* v. *Family Practice Assocs.*, 996 A.2d 1279, 1284 (Del. 2010) ("Under Delaware law, a party's failure to raise a legal issue in the text of an opening brief constitutes a waiver of that claim in the matter under submission to the court."). This Court's Rule 14(b)(vi)(A)(3) states that "The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal." *See also* Del. Sup. Ct. Rule 14(c)(i) ("Appellant shall not reserve material for reply brief which should have been included in a full and fair opening brief.").

Because each of the Chancellor's two determinations of breach—that Martin disclosed Evaluation Material in breach of the NDA and Confidential Materials in breach of the JDA—fully supports the judgment on appeal, this Court has no occasion to address whether the Chancellor correctly determined that Martin breached the NDA and the JDA in other ways as well. *See Murphy*, 632 A.2d at 1152-53 (argument challenging judgment on review "need not be addressed by this Court" when independent ground supports judgment and is not contested in opening brief).

II. THE CHANCELLOR CORRECTLY CONCLUDED THAT MARTIN VIOLATED THE USE RESTRICTIONS OF THE NDA.

A. Question Presented

Under the NDA, Martin could use Vulcan's nonpublic information "solely for the purpose of evaluating a Transaction." Did the Chancellor erroneously determine, after resorting to extrinsic evidence, that Martin's exchange offer and proxy fight were not Transactions? The interpretation of the NDA was raised in (B58-62, B93-98, B161-65, B228-33, B235-37, B270-72) and considered by (Op. 56-89) the Court of Chancery.

B. Scope of Review

This is a mixed question. "The interpretation of contract language is reviewed by this Court *de novo*." *Sonitrol Holding Co.* v. *Marceau Investissements*, 607 A.2d 1177, 1181 (Del. 1992). A contractual provision is unambiguous only if there is but one reasonable interpretation. *Rhone-Poulenc Basic Chems. Co.* v. *American Motorists Ins.*, 616 A.2d 1192, 1196 (Del. 1992). "To the extent the trial court's interpretation of contract language rests on findings concerning extrinsic evidence," this Court may not set those findings aside "unless they are unsupported by the record and are not the product of an orderly and logical deductive process." *Id.* at 1181; *Levitt* v. *Bouvier*, 287 A.2d 671, 673 (Del. 1972). Findings of fact that "turn[] on a question of credibility and the acceptance or rejection of 'live' testimony . . . will be approved upon review." *Id.*

C. Merits of the Argument

1. Martin does not challenge Chancery's finding that Martin used Vulcan's nonpublic information "in deciding upon, formulating, and selling its Exchange Offer and Proxy Contest." Op. 89. Martin appeals only the question whether its use was permissible notwithstanding its agreement to "use Evaluation Material solely for the purpose of evaluating a Transaction." NDA ¶ 2.

The NDA defines "Transaction" as a "business combination transaction [] between Martin [] and Vulcan [] or one of their respective subsidiaries." NDA at 1. The Chancellor analyzed in turn the phrase "business combination transaction," Op. 60-74, and the word "between," Op. 74-81. The Chancellor explained "that on an initial reading the contractual language seems most naturally to refer to a contractual agreement between the two companies, through their governing boards, to consummate a transaction combining the two companies' assets." Op. 60. The Chancellor also concluded that Martin's attempt to cast its proxy contest as a Transaction presented "awkward definitional and contextual problems," Op.

73, and that Martin's reading of the word "between" was "a bit of a stretch," Op. 79. Still, the Chancellor gave Martin the benefit of the doubt and examined the extrinsic evidence to resolve the possible ambiguity. Op. 81-89.

To reverse the Chancellor's judgment, the Court must conclude either (1) that the Chancellor's interpretation is not a reasonable one (*i.e.*, that the contract *unambiguously* permits use for a hostile takeover and that the contrary interpretation is unreasonable as a matter of law), or (2) that the Chancellor's evaluation of the extrinsic evidence was clearly erroneous.

2. This Court should reject Martin's contention that its exchange offer and proxy contests are *unambiguously* "business combination transaction[s] [] between" Martin and Vulcan. The most reasonable interpretation is just the opposite.

a. Martin's takeover bid is not a "business combination transaction." Through its exchange offer, Martin proposed to acquire shares of Vulcan from its stockholders. Through its proxy contest, Martin sought to place its nominees on Vulcan's board. Neither component of Martin's bid entailed the combination of Martin and Vulcan; Martin's exchange offer and proxy contest could be completed with both Martin and Vulcan remaining separate.

Confirming that Martin's hostile bid is not unambiguously a "business combination transaction," under our law—which Vulcan and Martin selected to govern their agreement, NDA ¶ 10—no Delaware case holds that a proxy context or exchange offer is a business combination. But our courts *have* held that a tender offer is *not* a "business combination." *In re Home Shopping Network, Inc. S'holders Litig*., 1993 WL 172371, at *10 (Del. Ch. May 19, 1993) (under DGCL § 203, holding that tender offer is not a "business combination" because it is "directed not at the target corporation, but at its shareholders."). That reasoning applies to the proxy contest and exchange offer, both of which are "directed . . . at [the] shareholders." *Id.*

b. Next, neither the proxy contest nor the exchange offer was "*between*" Martin and Vulcan. The word "between" means "involving the reciprocal action of: involving as participants: jointly engaging." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 209 (3d ed. 2002). Vulcan has never been a participant in Martin's exchange offer and proxy contest, the entire purpose of which is to bypass Vulcan. In Martin's own words: "After Vulcan effectively terminated negotiations that could have led to a negotiated transaction months ago, Martin Marietta was compelled to present its proposal for a combination of Martin Marietta and Vulcan directly to Vulcan's shareholders." B430.

Martin argues that the Chancellor was wrong to ignore "the natural and broad definition of 'between' found in numerous dictionaries" to mean "'linking,' 'connecting,' and 'intermediate to.'" Br. 13-14. The Chancellor did not "ignore" Martin's proffered meaning. The Chancellor noted that it was a "stretch," (Op. 75-76), but examined it with care. As the court explained, "between" when used as a preposition can mean "linking" or "connecting," but only to "indicate spatial relationships." Op. 79; *see* RANDOM HOUSE COMPACT UNABRIDGED DICTIONARY 200 (2d ed. 1996) ("between" can mean "linking; connecting" in the spatial sense of "air service between cities"). And the use of "between" to relate the idea of being "[i]ntermediate to" something else is reserved for the context of "quantity, amount, or degree," as in the sentence "[i]t costs between 15 and 20 dollars." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 175 (4th ed. 2009) (emphasis omitted); OXFORD AMERICAN DICTIONARY 58 (1980) (same). Dictionaries also make clear the general usage that "*between* [refers to] two persons or things or ideas, *among* [to] three or more." OXFORD AMERICAN DICTIONARY 58 (1980); *see also* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 175 (4th ed. 2009). Thus, if the NDA was meant to capture transactions involving Martin, Vulcan, and the shareholders of Vulcan, it would have used the word "involving" or "among," rather than the word "between." In sum, the definition of "between" adopted by Chancery is not only reasonable by every measure—which is all this Court need conclude to affirm—but also the *most* reasonable. Op. 75-77.

c. The well-publicized case of *Certicom Corp.* v. *Research in Motion Ltd.*, (2009) 94 O.R. 3d 511 (Can. Ont. Sup. Ct. J.), decided shortly before the parties entered into the NDA, is directly on point, and confirms that Martin's bid is not a "Transaction." *Cf. Airgas, Inc.* v. *Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1193-95 (Del. 2010) (interpreting charter by reference to *Essential Enters. Corp.* v. *Automatic Steel Prods., Inc.*, 159 A.2d 288 (Del. Ch. 1960)). RIM had used "Confidential Information" protected under a non-disclosure agreement between the parties to evaluate a hostile bid for Certicom's shares. At issue in *Certicom*, just like here, was "whether [the] hostile take-over bid is some form of *a business combination between the parties* and therefore whether [] Confidential Information could be used for the purpose of assessing the desirability of a hostile bid." 94 O.R. 3d 511, ¶¶ 13, 40-59 (emphasis added). Relying on the "ordinary and usual meaning and dictionary definition of the word 'between,'" the court held that "a takeover bid would . . . only amount to a business combination *between* the parties if Certicom [the target] consented to, or endorsed, the transaction and in that manner participated with RIM [the bidder] in RIM's bid"—*i.e.*, a "friendly bid." *Id.* ¶¶ 53-54. *Accord In re Pure Res., Inc., S'holders Litig.*, 808

A.2d 421, 437 (Del. Ch. 2002) (tender offer "different from [a] negotiated merger" in that it "takes place between the controlling shareholder and the minority shareholders"). *Certicom* demonstrates at a minimum that "Transaction" under the NDA cannot be thought to mean *unambiguously* what Martin claims—which is all that need be found to affirm.

d. Paragraph (7) of the NDA lends further support to the view that "Transaction" refers to an agreement between the companies to combine—and not to one side's unilateral bid. It reads in part: "Each party agrees that unless and until a *definitive agreement* ***between*** the parties with respect to a Transaction has been executed and delivered, neither party will be under any legal obligation of any kind whatsoever with respect to such a Transaction . . . ." (Emphasis added.) This provision, which "is 'intended to forestall any argument that the parties have already reached an agreement regarding a transaction . . . or that either party is under an obligation to reach such an agreement, or even to negotiate,'" indicates that Martin and Vulcan "intend[ed] the hoped-for 'transaction' to be accomplished by way of contract" between them. Op. 71-72.

e. Martin's assertion that its hostile bid is a "Transaction" is impossible to square with the precept that a court considering the four corners of a contract must "determin[e] what a reasonable person in the position of the parties would have thought the language of [the contract] means." *Lorillard Tobacco*, 903 A.2d at 739. It defies commercial logic to surmise that reasonable businesspersons wishing to explore a combination with a principal competitor would intend that sensitive nonpublic information voluntarily exchanged under the cover of a confidentiality agreement could be freely used for a hostile purpose. Companies do not share their confidential information to have it used against them.

3. Against all this, Martin's main argument is that the Chancellor, in interpreting the word "Transaction," improperly read into the NDA a standstill agreement where there was none. *E.g.*, Br. 9, 11, 14, 15, 16. In variants on this argument, Martin says that the Chancellor improperly inserted a word like "negotiated" or "consensual" within the definition of "Transaction," *e.g.*, Br. 10, 14, and "add[ed] a dead-hand board provision to the NDA," Br. 12-13. Martin's rhetoric is misplaced.[4] The Chancellor did not "add[] language to an unambigu-

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[4] Martin's silly argument could be turned equally on Martin. Martin could be said to be seeking to write into the agreement a new provision specifying that, "Notwithstanding anything to the contrary in this agreement, the parties reserve

ous contract." Br. 10. The Chancellor interpreted and enforced the NDA by applying settled principles of Delaware law—concluding that the NDA was ambiguous and resorting to extrinsic evidence to resolve the ambiguity. *See* Op. 81-82; *see also, e.g.*, Op. 131 ("An examination of all the evidence here convinces me that Martin Marietta is not being held to any promise it did not make.").

As written and correctly interpreted by Chancery, the NDA does not contain a standstill, let alone anything like a dead-hand provision. Martin's bid breached the NDA not because the NDA absolutely proscribed exchange offers and proxy contests—as a standstill would have. Rather, Martin's hostile bid breached the NDA because (1) Vulcan shared nonpublic information with Martin, (2) Martin, in launching its bid, used Vulcan's information, and (3) the NDA proscribed that use. *See Certicom*, 94 O.R. 3d 511, ¶¶ 55-59 (unlike a standstill, which provides "absolute protection" against hostile bids, confidentiality agreement "entails the need for proof of disclosure *and* proof of use of confidential information"). Had Vulcan not shared its information, or had Martin not used Vulcan's information—for instance, through the deployment of clean teams—Martin's unsolicited bid would not have run afoul of the use restriction of the NDA. But because Martin *did* use Vulcan's information in service of its hostile bid, and because Martin's hostile bid is not a "Transaction," Martin breached.

A confidentiality agreement is not a standstill. But it is a binding contract that "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." *Id.* ¶ 56. This interpretation invites neither confusion nor surprise—to the contrary, not only the *Certicom* court, but practitioner treatises have over and over again noted that confidentiality agreements may "bar the Buyer from proceeding . . . except in a negotiated transaction." LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES & DIVISIONS § 9.02 (2011); *see also* Op. 81 & nn.178-180, 84 n.185, 88 n.195 (collecting authority). The proposition Martin sponsors—that the NDA should be held unenforceable because it does not include a standstill—is unsupported by any authority and contrary to our law, and would seriously violate important public policy interests. Op. 129-31.

4. Martin next says the Chancellor erred because he "ignored" that Martin's hostile bid contains the "express condition that the parties enter into a mer-

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the right to use and disclose information protected by this agreement to launch a hostile bid, including an exchange offer and proxy contest, against each other."

ger agreement." Br. 11-12. But Martin does not acknowledge that it brought suit in New Jersey precisely to preserve its ability to complete a transaction *without* Vulcan board approval. B558-59; B594-96. And as the Chancellor explained, the merger condition remained waivable,[5] and "the obvious strain of this condition shows Martin Marietta's concern about what 'between' means" in the NDA. Op. 79-80. "[I]f Martin Marietta was really true to its argument, it would abandon its Exchange Offer, as that Offer is in a sense illusory" and just "a pressure ploy." Op. 80. At any rate, Martin's *proxy contest* is plainly not conditioned on the board's prior approval of an agreement to combine. To the contrary, the purpose of the proxy contest is to unseat board members so as to have more receptive negotiators, and it could be completed without a merger agreement ever being executed.

5. The Chancellor determined that Vulcan's interpretation of "business combination transaction between Martin and Vulcan" is reasonable—indeed, that it was the "most natural[]" and "more reasonable" one. Op. 59-82, 98. Unless this Court determines that *only Martin's interpretation* is reasonable, then, to justify reversal, Martin must show that the Chancellor's evaluation of the extrinsic evidence was clearly erroneous. Although Martin's brief does not directly challenge the Chancellor's thorough discussion of the extrinsic evidence, Martin does say in conclusory fashion that the Chancellor's "speculation about the parties' intent . . . finds no support in the record." Br. 15-16.

But as discussed *supra* at 5-6, the record establishes that Martin's CEO Nye told Vulcan's banker at the outset of discussions that "this company **is not for sale**. What we're interested in discussing is the prospect of a merger, but not an acquisition whether by [Vulcan] or otherwise." A763 (emphasis in original); Op. 82. He also told Vulcan's CEO James that "[s]tructurally, we think of this transaction, as I think you do, as a modified 'merger of equals.'" A803; Op. 82.

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[5] In a footnote, Martin says the Chancellor should have "rel[ied] on counsel's clear [] representation," in its post-argument briefing, that "the condition would not be waived." Br. 11 n.5 (citing A747). The cited brief says only that "Martin Marietta will commit not to waive" that condition, and Martin did *not* waive the condition in the six weeks that followed. The Chancellor did not err in relying on the fact that "Martin Marietta ha[d] not amended its Exchange Offer to make the condition non-waivable," Op. 80, rather than accept a vague statement, in the future tense, in the conclusion of a post-trial submission. At any rate, Martin cannot raise an argument in a footnote. Del. Sup. Ct. Rule 14(b)(vi)(A)(3).

Martin asserts neither Nye nor Vulcan's banker had anything to do with negotiating the NDA, Br. 16, but Nye testified that he related his conversations concerning confidentiality (and the agreements) to Bar. A142. Nye "gave marching orders to" Bar, whose changes to the precedent "had the effect of strengthening the protections afforded by it." Op. 83; *see supra* at 6-8. Bar was the one who defined "Transaction" to mean "a possible business combination transaction [] between" Vulcan and Martin. Op. 83.

The Chancellor found that Bar "was aware in May 2010 of the . . . *Certicom*" decision "and its implications on the use of the word 'between'" Op. 83-84. Martin states the Chancellor had "no basis" for this finding. Br. 15. But Bar was "an experienced and accomplished attorney" who was drafting a confidentiality agreement just one year after *Certicom*. Op. 83-84. The confidentiality agreement was critically important. Op. 11-15. Bar was relying on the advice of counsel at Skadden Arps. B277. "*Certicom* was widely commented on in law firm memoranda, practitioner journals and widely circulated publications like the *Wall Street Journal*." Op. 84 n.185. And Bar added ***precisely*** the key terms at issue in *Certicom*—"business combination" and "between." Op. 83. The conclusion that Bar was aware of *Certicom* is not clearly erroneous.

Martin next says the Chancellor was wrong to conclude that Nye was concerned "to avoid an unsolicited offer from Vulcan," as opposed to "an interloper." Br. 16. But the record evidence is clear that Nye was not "interested" in discussing "an acquisition [] *by [Vulcan]*," A763 (emphasis added), and was only interested in a merger-of-equals type transaction, Op. 82; A803.

Moreover, the Chancellor relied on a vast amount of additional evidence, all of which supports the Chancellor's conclusion, but none of which is even acknowledged in Martin's brief. A few examples of many: Looking at Martin's "conduct in the months leading up to the launch of its hostile bid," the Chancellor explained that Bar's "clunky attempt to gather up all the Evaluation Material in the possession of Martin Marietta management and put [it] in a sealed box" amounted an admission that the NDA proscribed Martin's use. Op. 84-85; A230-33; B311-78; *see also supra* at 9-10; Op. 43-44 (quoting B383-84). So, too, the "careful" and "odd" reference in Martin's August board minutes that its CEO's synergies presentation was based on "'publicly available information.'" Op. 85 (quoting B309). The Chancellor also concluded that Bar's "comments on the draft JDA," which limited use to the friendly deal under discussion, would have made no sense if the parties intended in the NDA to preserve use for a hostile deal, and that these comments further "evidence[d] a desire on Martin Marietta's part to tighten the language of the Confidentiality Agreements." Op. 86; B284.

III. THE CHANCELLOR CORRECTLY CONCLUDED THAT MARTIN VIOLATED THE USE RESTRICTIONS OF THE JDA.

A. Question Presented

Under the JDA, Martin could use Vulcan's information "solely for purposes of pursuing and completing the Transaction," defined as "a potential transaction *being discussed* by Vulcan and Martin Marietta." The Chancellor found as facts that the parties were discussing only a friendly merger when the JDA was signed and that Martin used Vulcan's information to pursue its hostile bid. Chancery thus found Martin in breach of the JDA. Did the Chancellor clearly err? This question was raised in (B62-64, B93-98, B163-65, B233-37, B271) and considered by (Op. 56-59, 85-87, 89-90) the Court of Chancery.

B. Scope of Review

The Court reviews for clear error the Chancellor's finding that the transaction being discussed was a friendly one. *Levitt*, 287 A.2d at 673. Contractual text is interpreted *de novo*. *Sonitrol*, 607 A.2d at 1181.

C. Merits of the Argument

1. Whether Martin's hostile bid was a "Transaction" under the JDA, and thus whether Martin's use was permitted, turned on the factual question of what "potential transaction" was "being discussed" at the time the JDA was signed. Reviewing the evidence, the Chancellor found as a fact that "the only transaction that was 'being discussed' at the time the parties entered into the JDA was a negotiated merger." Op. 86-89; *see also* Op. 14. Consequently, the court held that Martin's exchange offer and proxy contest were not "Transactions," and so Martin's use of Vulcan's antitrust information amounted to a breach of contract.

2. The Chancellor's factual finding is not clearly erroneous. As explained *supra* at 5-8, in April 2010, Nye told Vulcan that Martin was "not for sale," but that Martin was "interested in ***discussing*** [] the prospect of a ***merger***, but ***not an acquisition*** whether by [Vulcan] or otherwise." A763 (emphases added). On May 11, 2010, in conversation with James, Nye characterized the transaction under discussion as "a modified 'merger of equals.'" A803. And Nye reported the same to his board. B276 ("the structure [discussed with Vulcan is] a modified merger of equals"); *see also* A141-42 (Nye trial testimony). All this evidence supports Chancery's finding that the only "transaction being discussed" when the parties signed the JDA was a friendly merger. Martin's observation that "the parties never . . . 'discussed' any parameters of a potential transaction in definitive terms, never shared a term sheet, and never agreed even on

such basic matters as price, structure, control premium (if any), board composition, [etc.]," Br. 29, is entirely consistent with the court's finding. Certainly it does not show clear error.

3. Martin asserts that the Chancellor erroneously held that the JDA "strengthened the protections afforded by the NDA." Br. 28. Martin notes that Paragraph 12 of the JDA provides that "[n]either the existence of nor any provision contained in this Agreement shall affect or limit any other confidentiality agreements, or rights or obligations created thereunder, between the Parties in connection with the Transaction." According to Martin, this implies that the JDA "cannot limit Martin Marietta's right to use information" under the NDA. Br. 28.

This argument fails on multiple grounds. *First*, the NDA does ***not*** authorize Martin to use Vulcan's nonpublic information in service of its hostile bid, *see supra* at 14-20, so even if the rest of Martin's argument is correct (which it is not), it does Martin no good. *Second*, the Chancellor held that the JDA, by its independent terms, barred Martin's conduct—without regard to any provision of the NDA. Op. 89-90. *Third*, paragraph 12 of the JDA "does not prevent the JDA, which is a more particular agreement designed to apply to information shared for a particular, defined purpose, from strengthening the protection afforded to nonpublic information shared for that purpose." Op. 90. As Martin would have it, the rights and obligations spelled out in the NDA would specify when Vulcan and Martin could use information protected by the JDA, making meaningless the use restrictions in the JDA. Nothing in the words of the JDA (or the NDA) support that absurd result, which would reduce the JDA to a nullity, violating a "cardinal rule" of contract construction. *Sonitrol*, 607 A.2d at 1184.

4. Martin suggests that, even if "Transaction" means a "negotiated transaction," it did not breach the JDA because "the JDA expressly allows the use of information 'for purposes of pursuing and completing the Transaction,'" and Martin's hostile bid "ultimately will facilitate . . . a negotiated transaction." Br. 29. Nothing in the commercial context of the agreement, or common sense, suggests that by limiting use to the transaction "being discussed," the parties nonetheless intended to permit use for hostile transactions that were *not* being discussed. *See Lorillard*, 903 A.2d at 739. Nor is Martin's interpretation consistent with the contractual context. The JDA is a "*common* interest, *joint* defense & confidentiality agreement"—because Martin and Vulcan were discussing a consensual transaction. By Martin's reckoning, the JDA would oblige Vulcan to cooperate with Martin in litigation mounted against a hostile bid launched by Martin. Delaware law does not countenance such commercially absurd results.

IV. THE CHANCELLOR CORRECTLY HELD THAT DISCLOSING TRANSACTION INFORMATION BREACHED THE NDA

A. Question Presented

Did the Chancellor correctly conclude that Martin breached the NDA by disclosing Transaction Information? Whether Martin breached the NDA in this manner was raised in (B43-46, B84-88, B167-72, B174-79, B243-51, B268-70) and considered by (Op. 90-116, 120-28) the Court of Chancery.

B. Scope of Review

This is a mixed question. *See supra* at 14.

C. Merits of the Argument

As Martin concedes, Martin disclosed protected Transaction Information in detail when it announced its hostile bid. Martin's only defense is that its disclosures were "legally required" within the unambiguous meaning of the NDA.

The Court of Chancery identified three independent grounds for its conclusion that Martin breached the NDA by disclosing Transaction Information: (1) The court deemed Vulcan's reading of the NDA—under which disclosure of Transaction Information is permissible only if consistent with paragraph (4)—to be reasonable and supported by the extrinsic evidence. (2) The court held that even if the NDA permitted disclosure of Transaction Information to comply with SEC rules, Martin's disclosure in SEC filings exceeded what was required. (3) The court held that, in any event, Martin disclosed Transaction Information outside of its SEC filings when it was concededly not required to do so. Chancery's conclusion that Martin breached the NDA by disclosing the parties' negotiations may be disturbed only if all three holdings are in error.

1. Vulcan's reading of the NDA is reasonable.

a. Vulcan proposed, and the Court of Chancery accepted, a straightforward reading of the NDA's disclosure provisions. Paragraph (2) of the NDA prohibits the disclosure of a party's Evaluation Material to anyone other than the receiving party's representatives. Paragraph (3) provides:

> ***Subject to paragraph (4)***, each party agrees that, without the prior written consent of the other party, it and its Representatives will not disclose to any other person, other than as legally required, [any Transaction Information]. (Emphasis added).

Paragraph (4), titled "Required Disclosure," in turn defines "requested or required" disclosure as disclosure sought by means of "oral questions, interroga-

tories, requests for information or documents in legal proceedings, subpoena, civil investigative demand, or similar process." Paragraph (4) goes on to provide that if so "requested or required" to disclose protected information, a party must give "prompt notice . . . so that the other party may seek a protective order or other appropriate remedy and/or waive compliance with the provisions of [the NDA]." NDA ¶ 4. If no waiver is granted, the party purportedly subject to the requirement may disclose only information that its counsel advises is "legally required" to be disclosed. NDA ¶ 4. Paragraph (4) expressly references "the facts, the disclosure of which is prohibited under paragraph (3)."

Read together, paragraphs (2), (3) and (4) coherently regulate the disclosure of protected information. Paragraph (2) prohibits disclosure of Evaluation Material while paragraph (3) prohibits disclosure of Transaction Information. Both are subject to paragraph (4)—indeed, paragraph (3) is *expressly* made "subject to" paragraph (4)—which governs "required" disclosures. As the Chancellor held, "Vulcan's reading of the NDA is one that harmonizes all the relevant provisions of the agreement by coming up with a single, workable scheme." Op. 98.

b. All Martin can muster in response is that Vulcan's reading renders redundant the phrase "other than as legally required" in paragraph (3). Br. 19. Martin argues that this phrase unambiguously establishes an entirely independent disclosure regime that—directly contrary to paragraph (4)—"provides a party with a free license to disclose using only its own subjective judgment." Op. 100.

But Martin's reading cannot be reconciled with paragraph (3). Paragraph (3) is "[s]ubject to paragraph (4)." As Delaware law requires, the Chancellor concluded that this phrase "makes clear that ¶ 3 is subordinate to ¶ 4." Op. 95. *Penn Mut. Life Ins. Co.* v. *Oglesby*, 695 A.2d 1146, 1150 (Del. 1997) (general provision made "subject to" other specified provisions is "sublimate[d] or 'trump[ed]'" by them); *United Rentals, Inc.* v. *RAM Holdings, Inc.*, 937 A.2d 810, 833 (Del. Ch. 2007) (term "'subject to' . . . impose[s] a hierarchy among provisions"); *Harrah's Entm't, Inc.* v. *JCC Holding Co.*, 802 A.2d 294, 316 (Del. Ch. 2002) (same). The text makes clear that "legally required" in paragraph (3) does not expand the scope of "required disclosures" in paragraph (4).

Moreover, Martin's interpretation would create separate disclosure regimes for Evaluation Material and Transaction Information without any justification. Op. 97. On Martin's view, disclosure of Transaction Information is permitted under the NDA when there is no legal process, without notice, in the unfettered discretion of the disclosing party. But disclosing the same facts pursuant to a subpoena would be permitted only if the disclosing party notifies the other party and the disclosing party's counsel opines that the disclosures are legally re-

quired. Op. 95. Nothing in logic or the structure of the contract supports this commercially unreasonably result. *Id.*

Equally implausibly, Martin's reading means that "legally required" denotes something different in paragraph (3) and paragraph (4). According to Martin, in paragraph (3), "legally required" disclosure is any disclosure made to comply with a legal duty, whether imposed by legal process or not, and in paragraph (4), "legally required" disclosure is limited to disclosure in response to legal process. Martin's reading thus conflicts with the canon that when the "same words" appear in multiple places in one contract, it is "simply not reasonable" to give them "different meanings." *USA Cable* v. *World Wrestling Fed'n Entm't, Inc.*, 2000 WL 875682, at *9 (Del. Ch. June 27, 2000); *Carlisle* v. *Del. Trust Co.*, 99 A.2d 764, 776 (Del. 1953) (applying canon to will); *Taylor* v. *Diamond State Port Corp.*, 14 A.3d 536, 539 (Del. 2011) (applying canon to statute); Op. 108.[6]

And in the name of avoiding superfluity, Martin's interpretation makes the phrase "Subject to paragraph (4)" redundant. According to Martin, that phrase merely directs that "legally required" disclosure made in response to legal process must be made in accordance with paragraph (4), not that all "legally required" disclosure is governed by paragraph (4). But Paragraph (4) expressly applies to "the facts, the disclosure of which is prohibited under paragraph (3)"—*i.e.*, Transaction Information. So if Martin is correct that "legally required" in paragraph (3) is a freestanding excuse, the words "subject to paragraph (4)" are unnecessary. But under Vulcan's reading, the phrase makes clear that the exception for "legally required" disclosure recognized in paragraph (3) is governed by paragraph (4). Martin's interpretation thus creates a redundancy, which (unlike the redundancy it attributes to Vulcan's reading) renders other parts of the contract incoherent as explained above. *See US WEST Inc.* v. *Time Warner, Inc.*, 1996 WL 307445, at *15 (Del. Ch. June 6, 1996) (when redundancy is "unavoidable," court selects interpretation best reflecting intent of the parties); RESTATEMENT (SECOND) OF CONTRACTS § 203(a) & cmt. a (1981) (avoiding superfluity is a

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[6] Martin argues that in determining Vulcan's reading to be reasonable, Chancery erroneously conflated the term "legally required" in paragraph (3) with the term "requested or required" in paragraph (4). In fact, Chancery properly recognized that paragraph (4) defines "requested or required" disclosure as disclosure demanded by legal process and "legally required" disclosure as "required" disclosure that a party's counsel opines is "legally required," and that it is reasonable to ascribe the same definition to "legally required" in both paragraphs. Op. 95-97.

"standard of preference" that "appl[ies] only in choosing among reasonable interpretations" and "does not override evidence of the meaning of the parties").[7]

Finally, Martin is wrong to argue that the Chancellor read a "stealth standstill" into the NDA (*e.g.*, Br. 22). The court enforced the NDA's disclosure restrictions consistent with well-settled principles, and it is well recognized that a party accepting confidential information pursuant to an NDA may be limited in its disclosure and use. *See supra* at 17-18. But unlike a standstill, the NDA does not operate to broadly bar all unsolicited action. To the contrary, had Martin not used Vulcan's Evaluation Material, Martin could have sent a public hug letter, bought Vulcan shares, and even launched a proxy contest, so long as it did not publicly disclose Evaluation Material or Transaction Information.

For all these reasons, Vulcan's reading of the NDA is not only reasonable, it is also far more reasonable than Martin's. Chancery correctly ruled that the language of the NDA does not exclude Vulcan's reading as a matter of law. It follows that this Court should affirm Chancery's holding that Martin breached the NDA, as Martin challenges neither Chancery's finding that the extrinsic evidence uniformly supports Vulcan's reading of the contract nor that Martin disclosed Transaction Information when not required to do so by legal process.

2. Martin disclosed more than the SEC Rules required.

As an alternative holding, the Chancellor ruled that Martin breached the NDA even if compliance with SEC rules allowed disclosure of Transaction Information, because Martin's S-4 filing disclosed more than required. Op. 120.

a. Although Martin now insists that its disclosures were all legally required, its CEO admitted otherwise: "Nye admitted at trial that the disclosures Martin Marietta made to the SEC were not begrudging, but rather a tactical decision influenced by its flacks . . . ." Op. 50; *see also* Op. 123. Martin can only claim that its disclosures responded to a legal requirement if the Chancellor's finding of fact was clearly erroneous. *See Levitt*, 287 A.2d at 673. It was not. *See, e.g.*, A158-60; B386. The Court may affirm on this ground alone.

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[7] Martin also claims that the Chancellor's interpretation of the NDA effectively excises the words "in the event that" from the first sentence of paragraph (4). Br. 20-21. Martin's argument (which was not raised below) is difficult to comprehend. "In the event" here just means "If," and is in no way redundant: *If* a party is required to make a disclosure, *then* it shall follow certain procedures. Op. 108 n.224.

b. Martin asserts the Chancellor "failed to identify a single disclosure that was not legally required." Br. 23. This argument is inexplicable—Chancery held that the SEC rules required Martin to disclose only "the fact that the parties discussed a merger, that they entered into the Confidentiality Agreements, and that they ultimately could not come to terms on the utility of doing a deal." Op. 122. All the rest of Martin's ten-page, single-spaced account of the parties' negotiations was tactically driven, not "legally required." Martin also ignores that Chancery identified numerous specific disclosures that were not "required," including Martin's disclosure of Vulcan's opinions concerning antitrust risk, James's estimation of synergies, and James's view of alternative deal structures designed to minimize tax leakage. Op. 123-24.

And contrary to Martin's claim, the Chancellor did not hold that Martin's one-sided S-4 breached the NDA because that contract "obligated [it] to make only 'fair and balanced' disclosures." Br. 26. The court noted that (for example) Martin failed to disclose that Zelnak and Nye had scuttled earlier merger discussions to keep their jobs; that Martin was anxious to do a deal before Vulcan's cost-cutting initiatives eroded the synergies Martin could tout to investors; and that Nye was willing to forgo a 20% premium for Martin shareholders in exchange for his job, and observed that if Martin did not have to disclose Martin's negotiation positions or thought processes, then it certainly did not have to disclose Vulcan's. Op. 125-26. The court inferred from the imbalance that Martin's disclosures were not all required. Far from evincing scrupulous compliance with law, Martin's disclosures reflect a strategy to "portray Vulcan's decision for not proceeding with a deal in a bad light," Op. 123, while withholding facts that "cast its own management's motives in a bad light," Op. 125.

c. Martin also says Chancery erred because it "did not identify a single disclosure that was not a material fact." Br. 24. Martin's argument is based on the incorrect premise that federal law required it to disclose everything it considers material. Br. 24, 27. But the law does not require "[d]isclosure of an item of information . . . simply because it may be relevant or of interest to a reasonable investor. For an omission to be actionable, the securities laws must impose a duty to disclose the omitted information." *Resnik* v. *Swartz*, 303 F.3d 147, 154 (2d Cir. 2002). As the Chancellor held, disclosure of Transaction Information was required only if (1) expressly required by the rules, or (2) necessary to make other disclosures not false or misleading. Op. 120-26.

d. And Chancery was correct that the SEC's comment letters requesting more disclosure about certain topics (Br. 24-25) are irrelevant. The SEC was only policing Martin's registration statement to ensure that what Martin chose to

say was not materially misleading. 15 U.S.C. § 77h(b). While Martin's extensive, "highly opinionated" disclosure provoked the SEC to "ask[] for balance or further context," that "reveals little about whether Martin [] had any obligation" to make the disclosures "in the first instance." Op. 124-25.

Vulcan's claim in the U.S. District Court for the District of Alabama that Martin's Form S-4 is materially misleading (Br. 24) is entirely consistent with Vulcan's position here. Vulcan alleged in its federal suit that Martin's disclosures were materially misleading. Having unnecessarily disclosed the details of the parties' negotiations, Martin breached its contract; having disclosed those details in a one-sided fashion, Martin breached the securities laws. And Martin's claim that Vulcan conceded the materiality of prior discussions in its interrogatory responses (Br. 24) similarly misses the mark. Vulcan did not purport to identify what information was legally required, only what information could *not* be disclosed in light of Martin's contractual obligations. A1146.

3. Martin's PR campaign breached the NDA.

Finally, Chancery correctly concluded, in the alternative, that Martin breached the NDA by disclosing Transaction Information in "push pieces to investors, off the record and on the record communications to the media, and investor conference calls—disclosures that cannot possibly be claimed to have been 'legally required.'" Op. 127.

Martin argues the repetition of information previously revealed in SEC filings is not "disclosure" and thus cannot constitute a breach, citing a federal case applying the *fraud-on-the-market theory under the federal securities laws*—which supports a legal presumption that investors know the contents of SEC filings. *In re Keyspan Corp. Sec. Litig.*, 383 F. Supp. 2d 358, 374 (E.D.N.Y. 2003). But a presumption is not the same as a factual determination that all investors actually have such knowledge and Martin offers no reason to extend this legal presumption to excuse its tactical breach. The distinction is illustrated by Martin's conduct—if Martin thought every member of its audience already knew the Transaction Information in its SEC filings, it would not have bothered to repeat it. Op. 127-28. Each time it repeated the history of the parties' negotiations, Martin intended to reach new ears and to persuade Vulcan's shareholders to support Martin's hostile bid, harming Vulcan in just the way the NDA was drafted to prevent. The Chancellor thus correctly analogized Martin's repeated disclosures to libel law: just as the victim of lies is harmed by their repetition, and thus has an action in tort for each disclosure, Martin intentionally harmed Vulcan by the repeated publication of contractually protected information. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 557 cmts. a, d (1977).

V. MARTIN CANNOT CREATE ITS OWN LEGAL REQUIREMENT

A. Question Presented

Even on Martin's reading of paragraph (3) of the NDA, Martin had to show that its disclosures of Transaction Information were "legally required." Could Martin create its own legal requirement to excuse compliance with the NDA? This question, which provides an alternative basis to affirm the judgment that Martin breached paragraph (3), was raised in (B46-48, B87-88, B172-74) and considered, but not decided, by (Op. 115 n.241) the Court of Chancery.

B. Scope of Review

This issue, involving the interpretation of contractual text, is a legal one considered *de novo*. *See supra* at 14.

C. Merits of the Argument

Martin seeks to justify its disclosure of Transaction Information as "legally required." But Martin was not "required" to do anything at all. It *chose* to launch a hostile bid. It chose to do so when it did because it perceived advantage. Op. 12, 35-36. And it chose to do so via an exchange offer—the only hostile approach that triggers a line item requiring disclosure of negotiations, 17 C.F.R. § 229.1005(b)—for tactical gain. *See* Op. 122-23.

It is black-letter law that no contracting party may avoid its contractual obligations by imposing on itself a legal obligation for its own benefit. *See* CORBIN ON CONTRACTS § 76.11 (2011); *Peckham* v. *Indus. Sec. Co.*, 113 A. 799, 802 (Del. Super. Ct. 1921) (party may be excused from contractual commitments if they have "become impossible of performance," including as a result of "governmental act" or "decree of court," provided impossibility is "*through no fault of his*") (emphasis added); *Grynberg* v. *Burke*, 1981 WL 17034, at *8-*9 (Del. Ch. Aug. 31, 1981) (same); WILLISTON ON CONTRACTS § 39:4 (4th ed. 2011) ("[W]here one improperly prevents the performance or the happening of a condition of his or her own promissory duty, the offending party thereby eliminates it as a condition."). The SEC itself has recognized that "electing to make the public disclosure[s]" required in connection with a tender offer is not a "defense for a breach of duty owed by [the offeror] under a contractual or fiduciary relationship." SEC Rel. No. 6239, 1980 WL 20869, at *5 (Sept. 4, 1980). Martin cannot choose to commence an exchange offer and then complain that this "required" it to disclose protected information.

VI. THE COURT OF CHANCERY'S ENTRY OF AN INJUNCTION WAS NOT AN ABUSE OF DISCRETION

A. Question Presented

In the NDA and the JDA, Vulcan and Martin agreed that a breach would trigger the right to an injunction. In addition, the Chancellor found that Vulcan had in fact been irreparably harmed by Martin's breaches. The court then proceeded to balance the equities, and concluded that, in these circumstances, a four-month injunction barring Martin from further use and disclosure of Vulcan's information was reasonable. Was the entry of this limited remedy an abuse of discretion? This question was raised in (B64-74, B100-07, B185-92, B255-65) and considered by (Op. 132-37) the Court of Chancery.

B. Scope of Review

The entry of an injunction is vested to the sound discretion of the Court of Chancery. *See Osborn* v. *Kemp*, 991 A.2d 1153, 1158 (Del. 2010) ("We review the grant of specific performance for abuse of discretion.").

C. Merits of the Argument

1. The Chancellor did not abuse his discretion. Having determined that Martin breached the NDA and the JDA in five ways many times over, the Chancellor issued an injunction requiring Martin to abide by the terms of those contracts for four months. The court noted that the NDA, in paragraph 9, contained a stipulation that "'money damages would not be sufficient remedy for any breach . . . by either party' and that 'the non-breaching party shall be entitled to equitable relief, including injunction and specific performance, as remedy for any such breach'" and that "[t]he JDA contains a similar provision." Op. 132. The Chancellor explained that "such a stipulation is typically sufficient to demonstrate irreparable harm." Op. 133.

The Chancellor further found as a fact that "Vulcan is now suffering from exactly the same kind of harm Nye demanded the Confidentiality Agreements shield Martin Marietta from." Op. 134. For instance, Nye sought to protect Martin from being "put [] in play involuntarily at a time not of its own choosing" as a result of the disclosure of the fact of the discussions, Op. 133-34, and now "Vulcan finds itself responding to an unsolicited bid on the basis of improperly used and improperly disclosed confidential information, at a time when the economies in its key markets are still in a slump." Op. 134-35. The Chancellor explained that Vulcan had suffered losses "in terms of negotiating leverage, customer relations, and productivity" that were "difficult to impossible" to meas-

ure, Op. 134, and that "[t]he distraction to pushing forward with its day-to-day business plans when its employees cannot help but be preoccupied by Martin Marietta's Exchange Offer and Proxy Contest and its contractually improper selective revelation of nonpublic Vulcan information" was not only "hard to measure" but "real." Op. 135.

Having found irreparable harm, the Chancellor proceeded to balance the equities. Op. 135-36. The court explained that Martin had been "most scared of disclosure and facing an unsolicited bid." Op. 134-35 ("It comes with little grace for Martin Marietta to claim that these circumstances are not harmful to others when it causes the harm, but injurious to Martin Marietta when it feared enduring them."). And the court observed that there was "a sound basis for believing that failing to enforce confidentiality agreements in the M&A context will reduce, not increase, value-enhancing combinations." Op. 135; *see also* Op. 128-32. On balance, the Chancellor thought it "plain that the equities favor enforcing the Confidentiality Agreements as written . . . ." Op. 136. Noting that "an argument can be made that a longer injunction would be justified by the pervasiveness of Martin Marietta's breaches," the Chancellor entered a "measured" four-month injunction. Op. 136-37. Four months, the Chancellor explained, "is a responsible period that Vulcan selected by reference to the date on which Martin Marietta launched the Exchange Offer, which was on December 12, 2011, and the expiration date of the NDA, which occurred on May 3, 2012." Op. 136-37.

2. Martin argues that "[i]nstead of relying on evidence of harm, the trial court based its decision on the parties' stipulation that injunctive relief would be appropriate." Br. 30. As just explained, the Chancellor did no such thing—he expressly found as a fact that Vulcan had suffered actual and irreparable harm.

To the extent the Chancellor's decision was influenced by the stipulations in the NDA and the JDA, there was no error. Our courts have long held, and "repeatedly" so, "that contractual stipulations as to irreparable harm alone suffice to establish that element for the purpose of issuing preliminary injunctive relief." *Cirrus Holding Co.* v. *Cirrus Indus., Inc.*, 794 A.2d 1191, 1209 (Del. Ch. 2001).[8] Enforcing these contracts is consistent not only with longstanding Dela-

[8] *See, e.g.*, *GTSI Corp.* v. *Eyak Tech., LLC*, 10 A.3d 1116, 1121 & n.1 (Del. Ch. 2010); *Hexion Specialty Chems., Inc.* v. *Huntsman Corp.*, 965 A.2d 715, 762-63 (Del. Ch. 2008); *Gildor* v. *Optical Solutions, Inc.*, 2006 WL 4782348, at *11 (Del. Ch. June 5, 2006); *Kan. City S.* v. *Grupo TMM, S.A.*, 2003 WL 22659332, at *5 (Del. Ch. Nov. 4, 2003); *True N. Commc'ns Inc.* v. *Publicis S.A.*, 711 A.2d

ware authority, but also with the pro-contractarian nature of our law. Op. 133. After all, a stipulation of irreparable harm is only an agreement not to contest an element of proof that must be shown at trial.

Martin asserts *this* Court has never enforced a stipulation of irreparable harm, and so, ignoring the decisions of our courts, resorts to those of the Tenth Circuit Court of Appeals. Br. 31-32. But this Court *has* enforced other stipulations.[9] Absent a concern that contracting parties have conferred subject-matter jurisdiction where there is none, *see El Paso Natural Gas Co.* v. *TransAmerican Natural Gas Corp.*, 669 A.2d 36, 39 (Del. 1995), there is no reason not to enforce a stipulation of irreparable harm between sophisticated parties. The Chancellor's jurisdiction over this case cannot seriously be disputed. And even in the Tenth Circuit, a stipulation of irreparable harm is given weight, *Dominion Video Satellite, Inc.* v. *Echostar Satellite Corp.*, 356 F.3d 1256, 1266 (10th Cir. 2004)—which is all the Chancellor did.

Martin asserts that the contracts here do not contain stipulations of *harm*, but merely stipulations to injunctive *relief*. Br. 30-31. But the NDA does state that "money damages would not be sufficient." NDA ¶ 9. And regardless, a stipulation to injunctive relief, which requires a finding of irreparable harm, necessarily contains within it a stipulation to irreparable injury.

Martin also urges for the first time on appeal that "the only remedy that the stipulation could be read to include is a preliminary injunction *before* disclosure of confidential information, not a permanent injunction *after* the information has already entered the public domain." Br. 31. But the plain text of the NDA says that "the *non-breaching* party shall be entitled to equitable relief, including injunction and specific performance, as a *remedy* for any such *breach*." NDA ¶ 9 (emphases added). There is nothing preliminary or pre-disclosure about it. The stipulated injunction is meant to *remedy* a *breach*, not just to preliminarily prevent a threatened one.

3. Perhaps recognizing that the Chancellor *did* make a finding of irreparable injury, Martin switches course and asserts that "the trial court accepted Vulcan's speculative claims of harm made without any support." Br. 32. The

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34, 44 (Del. Ch. 1997); *SLC Beverages, Inc.* v. *Burnup & Sims, Inc.*, 1987 WL 16035, at *2 (Del. Ch. Aug. 20, 1987).

[9] *E.g.*, *Steppi* v. *Stromwasser*, 297 A.2d 26, 28 (Del. 1972); *Wallace* v. *State*, 211 A.2d 845, 847 (Del. 1965).

trial testimony of Vulcan's CEO James amply supports the Chancellor's findings. *See* A14; A15-17. James testified that, when Martin revealed publicly the fact of the negotiations, "[i]t put us in play at a time that we would not have wanted to be put in play," A14, because "this industry is in a recession," A15; *see* Op. 134-35. He testified that Vulcan's "customers ha[d] expressed concern about whether we would be able to continue to supply them." A16; *see* Op. 134. James stated that "[c]ertainly our employees are very concerned," and that "[o]ur executive team obviously is completely distracted from pursuing our internal strategic plan." A16; *see* Op. 134, 135. The testimony of Martin's PR adviser, too, supported the court's findings of fact. B512-13; B515-19. (For further evidence supporting the Chancellor's findings, *see, e.g.*, A160; B391 ("Vulcan Materials will be hard pressed to argue against the strategic rationale for the deal"); B412-13 (same).) There is no basis to upset the Chancellor's finding.

Nor is there any basis to set aside the Chancellor's finding that Martin's breach "*caused*" that harm. Br. 32. The Chancellor found, for instance, that Vulcan was injured by Martin's "contractually improper selective revelation of nonpublic Vulcan information." Op. 135. That harm is caused by the breach. The Chancellor also found, for instance, that Vulcan suffered a loss in "negotiating leverage," Op. 134—plainly something caused by the breach, too. *See* Op. 53 (holding that Martin used Vulcan's information in the public domain in order "to put pressure on Vulcan's board to accept a deal on Martin Marietta's terms").

4. Martin next seeks to challenge the Chancellor's order as unreasonable because it will delay Martin's proxy contest by one year, rather than four months. Br. 33.[10] That Martin will be unable to run a slate at the 2012 Vulcan meeting is a function of New Jersey law and the opportunistic timing of Martin's breach. New Jersey law requires director elections to be held annually, N.J. Stat. Ann. § 14A:5-2, while Vulcan's bylaws require advance notice of any shareholder nomination to the board, B520-24. In light of those requirements, Martin could not have launched a proxy contest in time to nominate directors in this election cycle if it wanted to use and disclose Vulcan's nonpublic information in service of that proxy contest. It breached the contracts when it did precisely to enjoy the premature benefits of using and disclosing Vulcan's information in this proxy cycle. And Martin has conceded that the Chancellor's order will do no more than delay its takeover attempt—it has stated that it "intend[s] to continue [its] efforts

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[10] Martin's attempt to elide the fact that the JDA has no expiration is based on a misreading of JDA ¶ 12 (*see* Br. 33) and is addressed *supra* at 22.

to combine with Vulcan . . . as soon as [it is] permitted to do so." B541. Martin's sole complaint is that it will lose the ill-gotten benefit of its breach.

5. In its brief, Martin asks the Court to reverse the judgment of the Chancellor and "dissolve that court's injunction." Br. 35. In its reply to Vulcan's opposition to expedition in this appeal, however, Martin asked for more—that the Court restore its ability to wage a proxy fight at Vulcan's June 1 meeting. Del. Sup. Ct. Docket Item 12 at ¶ 3 ("However, it cannot be seriously urged that if this Court concludes that the injunction was improvidently granted, this Court would not have the equitable power to restore Martin Marietta to the status quo ante."). Having failed to request this remedy in its opening brief, the argument is waived. *See* Del. Sup. Ct. R. 14. And an order reinstating Martin's nominees would require (at minimum) setting aside Vulcan's bylaws, which are governed by New Jersey law. Martin has neither properly requested such drastic relief nor made any showing that it would be warranted.

6. Finally, Martin asserts that the Chancellor's remedy "does not advance Delaware's interest in enforcing contracts" because it "signals to parties that they should not enter into a confidentiality agreement, even without a standstill provision, if they want to leave open the possibility of making an unsolicited bid later." Br. 33-34. Martin's argument is that, even though the Chancellor found that Martin had consciously and repeatedly breached two contracts in five different ways, even though the JDA has no date of expiration, even though the Chancellor found that Martin's conscious and "pervasive" breaches caused precisely the harm that the contracts were designed to prevent, and even though each contract prescribed that the remedy for breach would be an injunction, the Chancellor nonetheless abused his discretion in entering a four-month injunction. The reason: Vulcan and Martin did not include a provision called a "standstill." But Martin has provided no reason that these contracts should not be enforced as written and in accordance with the parties' intentions. The Chancellor's opinion well states the true Delaware policy interests at stake here. Op. 128-31.

Martin asks that there be no remedy at all for its plain and pervasive breach of contract. A breach "without a remedy" is something "equity abhors." *Mark T.* v. *Judith T.*, 430 A.2d 792, 793 (Del. 1981); *see also Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded"). Martin would render confidentiality agreements—and standstill agreements too—meaningless in the M&A context. There is "no warrant in our law for such adventurism and no empirical basis to move our common law of contracts in that direction." Op. 129.

CONCLUSION

The judgment of the Court of Chancery should be affirmed.

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May 21, 2012