

## CONFIDENTIALITY AGREEMENTS ARE CONTRACTS WITH LONG TEETH

By Byron F. Egan<sup>1</sup>

### I. Confidentiality Agreements And Their Effects Are Evolving

A confidentiality agreement (also sometimes called a non-disclosure agreement or “NDA”) is typically the first stage for the due diligence process in a business combination or joint venture transaction (collectively, “M&A”) as parties generally are reluctant to provide confidential information to the other side without having the protection of an NDA. The target typically proposes its form of NDA,<sup>2</sup> which may provide that it makes no representations regarding any information provided, and a negotiation of the NDA ensues. Some NDAs contain covenants restricting activities of the buyer after receipt of confidential information.<sup>3</sup>

The recent cases discussed below highlight that possible consequences of an agreement to maintain the confidentiality of information can be far reaching and are evolving. These cases also teach that, in addition to the importance of having contractual provisions sufficient to accomplish the intended objectives, director awareness of the effects of provisions in NDAs their companies enter into can have fiduciary duty implications. Thus, the lessons of these recent

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<sup>2</sup> A seller’s form of confidentiality agreement is attached as Appendix B to Byron F. Egan, *Acquisition Structure Decision Tree*, TexasBarCLE & Business Law Section of State Bar of Texas, Choice & Acquisition of Entities in Texas Course, San Antonio, TX, May 24, 2013, <http://www.jw.com/publications/article/1844>. See also Article 12 of the ABA Model Asset Purchase Agreement (2001) and the Model Confidentiality Agreement accompanying the ABA Model Public Company Merger Agreement (2011).

<sup>3</sup> See, e.g., *Goodrich Capital, LLC and Windsor Sheffield & Co., Inc. v. Vector Capital Corporation*, 11 Civ. 9247 (JSR) (S.D.N.Y. June 26, 2012) (confidentiality agreement prohibited use of confidential information solely to explore the contemplated business arrangement and not to minimize broker’s role or avoid payment of its fees; a prospective bidder used information provided about other comparable companies to acquire one of the other companies; broker’s lawsuit against that prospective bidder for breach of contract for misusing confidential information survived motion to dismiss); *In re Del Monte Foods Company Shareholders Litigation*, C.A. No. 6027-VCL, 2011 WL 532014 (Del. Ch. Feb. 14, 2011), (confidentiality agreement restricted bidders from entering into discussions or arrangements with other potential bidders; in temporarily enjoining stockholder vote on merger because target was unduly manipulated by its financial adviser, Delaware Vice Chancellor Laster faulted bidders’ violation of the “no teaming” provision in the confidentiality agreement and the target’s Board for allowing them to do so). See discussion of *Del Monte* case at then see Byron F. Egan, *How Recent Fiduciary Duty Cases Affect Advice to Directors and Officers of Delaware and Texas Corporations*, University of Texas School of Law 35th Annual Conference on Securities Regulation and Business Law, Austin, TX, Feb. 8, 2013, 252-55 nn.779-781, <http://www.jw.com/publications/article/1830>.

cases should be considered by counsel and discussed with the client before an NDA is entered into for a significant transaction.

## II. No Representations

In *RAA Management, LLC v. Savage Sports Holdings, Inc.*,<sup>4</sup> the Delaware Supreme Court held that non-reliance disclaimer language in a confidentiality agreement was effective to bar fraud claims by a prospective buyer. The prospective buyer had been told by seller during early discussions that seller had no significant unrecorded liabilities, but due diligence showed otherwise. The confidentiality agreement provided that seller made no representations regarding any information provided and that buyer could only rely on express representations in a definitive acquisition agreement, which was never signed. The non-reliance provision in the NDA at issue in the *RAA* case provided as follows:

You [RAA] understand and acknowledge that neither the Company [Savage] nor any Company Representative is making any representation or warranty, express or implied, as to the accuracy or completeness of the Evaluation Material or of any other information concerning the Company provided or prepared by or for the Company, and none of the Company nor the Company Representatives, will have any liability to you or any other person resulting from your use of the Evaluation Material or any such other information. Only those representations or warranties that are made to a purchaser in the Sale Agreement when, as and if it is executed, and subject to such limitations and restrictions as may be specified [in] such a Sale Agreement, shall have any legal effect.

After deciding not to pursue a transaction, the buyer sued seller to recover its due diligence and other deal costs. In affirming the Superior Court's dismissal of the buyer's complaint, the Delaware Supreme Court in *RAA* wrote:

Before parties execute an agreement of sale or merger, the potential acquirer engages in due diligence and there are usually extensive precontractual negotiations between the parties. The purpose of a confidentiality agreement is to promote and to facilitate such precontractual negotiations. Non-reliance clauses in a confidentiality agreement are intended to limit or eliminate liability for misrepresentations during the due diligence process. The breadth and scope of the non-reliance clauses in a confidentiality agreement are defined by the parties to such preliminary contracts themselves. In this case, *RAA* and *Savage* did that, clearly and unambiguously, in the NDA.

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The efficient operation of capital markets is dependent upon the uniform interpretation and application of the same language in contracts or other documents. The non-reliance and waiver clauses in the NDA preclude the fraud claims asserted by *RAA* against *Savage*. Under New York and Delaware law, the

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<sup>4</sup> 45 A3d 107 (Del. 2012).

reasonable commercial expectations of the parties, as set forth in the non-reliance disclaimer clauses in Paragraph 7 and the waiver provisions in Paragraph 8 of the NDA, must be enforced. Accordingly, the Superior Court properly granted Savage's motion to dismiss RAA's Complaint.

The RAA holding was consistent with other cases upholding non-reliance provisions under Delaware law. In *ABRY Partners V, L.P. v. F&W Acquisition LLC*,<sup>5</sup> a stock purchase agreement included a merger clause or a "buyer's promise" that it was not relying upon any representations and warranties not stated in the contract, and the Delaware Chancery Court wrote that such provisions are generally enforceable:

When addressing contracts that were the product of give-and-take between commercial parties who had the ability to walk away freely, this court's jurisprudence has . . . honored clauses in which contracted parties have disclaimed reliance on extra-contractual representations, which prohibits the promising party from renegeing on its promise by premising a fraudulent inducement claim on statements of fact it had previously said were neither made to it nor had an effect on it.

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The teaching of this court . . . is that a party cannot promise, in a clear integration clause of a negotiated agreement, that it will not rely on promises and representations outside of the agreement and then shirk its own bargain in favor of a "but we did rely on those other representations" fraudulent inducement claim. The policy basis for this line of cases is, in my view, quite strong. If there is a public policy interest in truthfulness, then that interest applies with more force, not less, to contractual representations of fact. Contractually binding, written representations of fact ought to be the most reliable of representations, and a law intolerant of fraud should abhor parties that make such representations knowing they are false.

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Nonetheless, . . . we have not given effect to so-called merger or integration clauses that do not clearly state that the parties disclaim reliance upon extra-contractual statements. Instead, we have held . . . that murky integration clauses, or standard integration clauses without explicit anti-reliance representations, will not relieve a party of its oral and extra-contractual fraudulent representations. The integration clause must contain "language that . . . can be said to add up to a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract's four corners in deciding to sign the contract." This approach achieves a sensible balance between fairness and equity — parties can protect themselves against unfounded fraud claims through explicit anti-reliance language. If parties fail to

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<sup>5</sup> 891 A.2d 1032 (Del. Ch. 2006).

include unambiguous anti-reliance language, they will not be able to escape responsibility for their own fraudulent representations made outside of the agreement's four corners.

In *Abry*, however, the Court allowed a fraud claim to proceed where, notwithstanding a clear anti-reliance provision, the plaintiff alleged that the defendant had intentionally lied within the four corners of the agreement.<sup>6</sup>

In *Pyott-Boone Electronics Inc., etc. v. IRR Trust for Donald L. Fetterolf Dated December 9, 1997*,<sup>7</sup> a diversity action involving the sale of a Virginia business, the disappointed buyer sued for damages for breach of the purchase agreement as well as for related tort claims and claims for breach of the Virginia Securities Act based on information that was furnished to buyer pursuant to a due diligence request months before the purchase agreement was signed. In dismissing the complaint the Court, applying Delaware law pursuant to the agreement's choice of law clause, found that plaintiff's breach of contract claim was founded on an impossibly broad interpretation of a provision to the effect that all representations and warranties in the agreement were correct and did not misstate or omit to state any material fact. The Court stated that "to reach the conclusion that the plaintiff advocates, the warranties contained in [that representation] would effectively encompass every statement any of the defendants ever made to the plaintiff regarding the sale throughout months of negotiations." In construing the provision, the Court was influenced by the purchase agreement's entire agreement provision which provided:

This Agreement, including the Schedules and Exhibits hereto, together with the Confidentiality Agreement constitutes the entire agreement of the parties hereto respecting its subject matter and supersedes all negotiations, preliminary agreements and prior or contemporaneous discussions and understandings of the parties hereto in connection with the subject matter hereof. There are no restrictions, promises, representations, warranties, agreements or undertakings of any party hereto with respect to the transactions contemplated by this Agreement, the Confidentiality Agreement, or the Transaction Documents, other than those set forth herein or therein or in any other document required to be executed and delivered hereunder or thereunder.

The Court held that "[t]he plain language of [the entire agreement provision] states that the parties made no representations beyond those specifically included in the agreement. If the

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<sup>6</sup> See Glenn D. West & W. Benton Lewis, Jr., *Contracting to Avoid Extra-Contractual Liability—Can Your Contractual Deal Ever Really Be the “Entire” Deal?*, 63 Bus. Law. 999 (August 2009). Cf. *OverDrive, Inc. v. Baker & Taylor, Inc.*, 2011 WL 2448209 (Del.Ch. June 17, 2011), which arose out of a joint venture agreement providing that “[n]either party is relying on any representations, except those set forth herein, as inducement to execute this Agreement,” and in which the plaintiff alleged that defendant intentionally lied about specific provisions in the joint venture agreement by failing to reveal plans to use confidential information received from plaintiff in arrangements with competitors; in denying defendant's motion to dismiss, Chancellor Chandler wrote that “[u]nder the teaching of *ABRY Partners V, L.P. v. F&W Acquisition LLC*, use of an anti-reliance clause in such a manner is contrary to public policy if it would operate as a shield to exculpate defendant from liability for its own intentional fraud—‘there is little support for the notion that it is efficient to exculpate parties when they lie about the material facts on which a contract is premised.’”

<sup>7</sup> \_\_\_\_ F. Supp. 3d \_\_\_\_ (No. 1:12CV00048 Jan. 15, 2013).

plaintiff wished to rely upon the [information furnished during the due diligence process], it should have negotiated for its explicit inclusion in the [purchase agreement].” Thus, the Court gave effect to the bargain the parties made as set forth in their contract.

Texas courts have dealt with non-reliance provisions outside of the M&A arena and have imposed conditions to their enforceability not found in Delaware cases. In *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co.*,<sup>8</sup> the Texas Supreme Court held that a merger clause does not waive the right to sue for fraud should a party later discover that the representations it relied upon before signing the contract were fraudulent, unless the clause also disclaims reliance on representations (thus negating an essential element of a claim for fraudulent inducement) and it is insufficient to merely state that promisor has not made any representations or promises except as expressly set forth in the agreement.

*Italian Cowboy* was influential in *Allen v. Devon Energy Holdings, L.L.C. F/K/A Chief Holdings, L.L.C. and Trevor Rees-Jones*,<sup>9</sup> in which Allen alleged that Chief and Trevor Rees-Jones, Chief’s manager and majority owner, fraudulently induced him to redeem his interest two years before the company sold for almost 20 times the redemption sales price to Devon Energy Production Company, L.P. The defense focused on disclaimers and release provisions in the redemption agreement, which it contended barred Allen’s fraud claims by negating reliance or materiality as a matter of law. The Court of Appeals held that the redemption agreement did not bar Allen’s claims, and that fact issues existed as to fraud and the existence of a fiduciary relationship, in reversing the trial court’s summary judgment for the defense and for such purpose assuming the correctness of the facts alleged by Allen below.

Allen and Rees-Jones served together as partners at a prominent Dallas law firm. Allen was an oil and gas transactions lawyer, and Rees-Jones was a bankruptcy lawyer before leaving the firm to go into the oil and gas business. Allen was one of Chief’s early investors, and relied on investment advice from Rees-Jones.

In November 2003, Rees-Jones decided to redeem the minority equity interests in Chief. He sent to the minority members a letter explaining the reasons for and terms of the redemption offer, to which he attached (1) an independent valuation firm’s opinion on Chief’s market value and (2) an appraisal of Chief’s existing gas reserves and future drilling prospects. The valuation report included discounts for the sale of a minority interest and for lack of marketability. The letter also included Rees-Jones’s pessimistic assessment of a number of facts and events that could negatively impact Chief’s value in the future.

The redemption proposal languished for seven months until June 2004 when Rees-Jones notified the minority members that Chief was ready to proceed with the redemption. Three of the minority members (including Allen) accepted the redemption offer, and four others chose to retain their interests. There were positive developments in the Barnett Shale area where Chief operated and within Chief in the seven months between the November 2003 offer and the June

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<sup>8</sup> 341 S.W.3d 323 (Tex. 2011).

<sup>9</sup> 367 S.W.3d 355 (Tex. App.—Houston [1st Dist.] March 9, 2012; case settled in 2013 while writ of error pending).

2004 redemption, and Allen asserts that these events, which Allen claimed were not disclosed to him and would have materially impacted his decision to redeem his interest.

Chief provided Allen with a written redemption agreement for the first time in June 2004, and “insisted” that the contract be signed by the end of the month. The parties did not exchange drafts, and Allen stated that he had only three days to review the agreement before signing because, as he was on vacation for much of the time.

The redemption agreement contained several release clauses which are discussed below, including an “independent investigation” paragraph, a general “mutual release,” and a merger clause which defendants claimed barred Allen’s fraud claims negating reliance or materiality as a matter of law. The “independent investigation” paragraph provided that (1) Allen based his decision to sell on his independent due diligence, expertise, and the advice of his own engineering and economic consultants; (2) the appraisal and the reserve analysis were estimates and other professionals might provide different estimates; (3) events subsequent to the reports might “have a positive or negative impact on the value” of Chief; (4) Allen was given the opportunity to discuss the reports and obtain any additional information from Chief’s employees as well as the valuation firm and the reserve engineer; and (5) the redemption price was based on the reports regardless of whether those reports reflected the actual value and regardless of any subsequent change in value since the reports. The independent investigation paragraph also included mutual releases “from any claims that might arise as a result of any determination that the value of [Chief] . . . was more or less than” the agreed redemption price at the time of the closing.

In a separate paragraph entitled “mutual releases” each party released the other from all claims that “they had or have arising from, based upon, relating to, or in connection with the formation, operation, management, dissolution and liquidation of [Chief] or the redemption of” Allen’s interest in Chief, except for claims for breach of the redemption agreement or breach of the note associated with the redemption agreement. Another paragraph contained a “merger clause” stating that the redemption agreement “supersedes all prior agreements and undertakings, whether oral or written, between the parties with respect to the subject matter hereof.”

Allen argued that fraudulent inducement invalidates the release provisions in the redemption agreement as “fraud vitiates whatever it touches,” citing *Stonecipher v. Butts*.<sup>10</sup> In rejecting that argument but holding that the release provisions in the redemption agreement were not sufficiently explicit to negate Allen’s fraud in the inducement claims, the Court of Appeals wrote:

The threshold requirement for an effective disclaimer of reliance is that the contract language be “clear and unequivocal” in its expression of the parties’ intent to disclaim reliance. [citations omitted] In imposing this requirement, the Texas Supreme Court has balanced three competing concerns. First, a victim of fraud should not be able to surrender its fraud claims unintentionally. [citations omitted] Second, the law favors granting parties the freedom to contract knowing that courts will enforce their contracts’ terms, as well as the ability to

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<sup>10</sup> 591 S.W.2d 806, 809 (Tex. 1979).

contractually resolve disputes between themselves fully and finally. [citations omitted] Third, a party should not be permitted to claim fraud when he represented in the parties' contract that he did not rely on a representation . . .

The Court then said that in view of these competing concerns, Texas allows a disclaimer of reliance to preclude a fraudulent inducement claim only if the parties' intent to release such claims "is clear and specific." Among the failings the Court found with the disclaimer language in the redemption agreement were: (i) it did not say none of the parties is relying upon any statement or any representation of any agent of the parties being released hereby; (ii) the broad language releasing "all claims, demands, rights, liabilities, and causes of action of any kind or nature" did not specifically release fraudulent inducement claims or disclaim reliance on Rees-Jones and Chief's representations (although it did release claims "of any kind or nature" (which necessarily includes fraudulent inducement), the elevated requirement of precise language requires more than a general catch-all--it must address fraud claims in clear and explicit language); (iii) the merger clause stated that the contract is the "final integration of the undertakings of the parties hereto and supersedes all prior agreements and undertakings," but did not include clear and unequivocal disclaimer of reliance on oral representations; (iv) the redemption agreement failed to state that the only representations that had been made were those set forth in the agreement; (v) it did not contain a broad disclaimer that no extra-contractual representations had been made and that no duty existed to make any disclosures; (vi) it did not provide that Allen had not relied on any representations or omissions by Chief; or (vii) it did not include a specific "no liability" clause stating that the party providing certain information will not be liable for any other person's use of the information.

The Court was careful to state it was not requiring that the words "disclaimer of reliance" must be stated in order for a disclaimer to preclude a fraudulent inducement claim or that each one of these issues must be addressed in every disclaimer. Rather, the Court stated that the redemption agreement lacked the following: "(1) an all-embracing disclaimer that Allen had not relied on any representations or omissions by Chief; (2) a specific 'no liability' clause stating that the party providing certain information will not be liable for any other person's use of the information; and (3) a specific waiver of any claim for fraudulent inducement based on misrepresentations or omissions."

Although the independent investigation clause stated that Allen "based his decision to sell" on (1) his own independent due diligence investigation, (2) his own expertise and judgment, and (3) the advice and counsel of his own advisors and consultants, the Court found that the statement of reliance on the identified factors did not clearly and unequivocally negate the possibility that Allen also relied on information he had obtained from Chief and Rees-Jones, and consistent with the terms of the redemption agreement, Allen could have relied on both. The Court found it incongruous to state that Allen could not rely on the information he was given, and noted the absence of the words "only," "exclusively," or "solely" are of critical importance in this case.

Rees-Jones and Devon argued that the redemption agreement contained language that released Allen's claims against them and that this language shows that the parties agreed broadly to disavow the factual theories he now asserts in his lawsuit. Although the redemption agreement released the parties from claims that arise from a determination that the redemption

price did not reflect Chief's market value at closing, it did not negate Allen's claims that Rees-Jones made misrepresentations and omissions concerning Chief's future prospects. Further the release disclaimed any claim by Allen based on a change in value from the 2003 appraisal to the date of redemption only, but the language did not cover Allen's claims that Rees-Jones and Chief withheld information relating to Chief's future prospects and potential value.

The Court further wrote, citing *Forest Oil Corp. v. McAllen*,<sup>11</sup> that even a clear and unequivocal disclaimer of reliance may not bar a fraudulent inducement claim unless (1) the terms of the contract were negotiated or boilerplate; (2) the complaining party was represented by counsel; (3) the parties dealt with each other at arm's length; and (4) the parties were knowledgeable in business matters. The Court found for defendants on two of the factors (Allen as an oil and gas attorney could not complain that he was not represented by counsel and was not knowledgeable). The Court, however, found fact issues as to the other two factors (whether the contract was negotiated and whether the parties dealt with each other at arm's length) and declined to grant Defendant's motion for summary judgment. The Court declined to say whether all four tests must be satisfied for an otherwise clear and unequivocal disclaimer of reliance to be enforceable.

In *Staton Holdings, Inc. v. Tatum, L.L.C.*,<sup>12</sup> a Texas Court of Appeals held, as a matter of first impression, that an express-intent requirement, under which a release of liability is enforceable only if the intent to grant such a release is expressed in specific terms within the four corners of the contract, applies to prospective releases of future breaches of warranty in service transactions. In so holding, the Court wrote:

We begin by reviewing Texas's express-negligence jurisprudence. Under Texas law, certain kinds of contractual provisions that call for an extraordinary shifting of risk between the parties are subject to the fair-notice doctrine. *See Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). In *Dresser Industries*, the Texas Supreme Court held that a release of liability for future negligence is enforceable only if it comports with both prongs of the fair-notice doctrine: the conspicuousness requirement and the express-negligence test. *Id.* at 509. Under the express-negligence test, a release of future negligence is enforceable only if the intent to grant such a release is expressed in specific terms within the four corners of the contract. *Id.* at 508; *see also Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987) (adopting the express-negligence test in the context of indemnity clauses). If a similar express-intent rule applies to breach-of-warranty claims, the release involved in this case is suspect because it does not expressly state that Staton is waiving claims for future breaches of warranty.

The Texas Supreme Court has extended the express-negligence test to some claims besides negligence. In 1994, the supreme court held that an indemnity agreement will not be construed to indemnify a party against statutorily imposed strict liability unless the agreement expressly states the parties' intent to

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<sup>11</sup> 268 S.W.3d 51 (Tex. 2008).

<sup>12</sup> 345 S.W.3d 729 (Tex.App.—Dallas 2011).



provide for indemnification of such claims. *Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 890 S.W.2d 455, 458-59 (Tex. 1994). The court indicated that the same express-intent rule would apply to claims for strict products liability.

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After considering the reasons supporting *HL & P's* extension of the express-intent rule to strict liability, we conclude the express-intent rule applies to breach-of-warranty claims.

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The release involved in this case does not expressly release claims for future breaches of warranty, so it does not bar Staton's breach-of-warranty claims

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The *Staton Holdings* case is another example of a Texas court acknowledgement that Texas law respects freedom of contract, including the right of parties to contractually limit their tort and other liabilities arising in respect of contracts, but that the Texas courts regard such a shifting of liability as so extraordinary that they require it to be clear, unequivocal and conspicuous in the contract so that there is no question that the parties knowingly bargained for that outcome. In that respect *Staton Holdings* is consistent with the results in *Italian Cowboy* and *Allen*, although the application of express negligence principles is new and an extension. These three 2011 cases suggest that the following principles should be considered when attempting to contractually limit liabilities under Texas law:

- Do not appear to use boilerplate provisions, however comprehensive, and tailor the limitation of liability provision for each transaction in a way that shows that it has been specifically negotiated and is not merely a boilerplate provision.
- Expressly disclaim reliance on any representations that are not embodied in the four corners of the agreement, and perhaps even in particular enumerated sections thereof.
- Expressly state that no reliance is being placed on any statements (i) by any representative of any of the parties whose liability is limited or (ii) in the dataroom (if such is the case).
- Expressly state that fraud in the inducement claims are being released.
- Expressly state that no reliance has been placed on any prior representations.
- Include both broad inclusive words of limitation of liability and then specifically address the particular kinds of representations not being relied upon.

- Put the limitation of liability provision in italics, bold face or other conspicuous type.<sup>13</sup>

A non-reliance provision based on those Texas principles might read as follows:

**\_\_\_\_\_ Entire Agreement, Non-reliance, Exclusive Remedies and Modification**

**(a) This Agreement supersedes all prior agreements, whether written or oral, between the parties with respect to its subject matter (including any letter of intent and any confidentiality agreement between Buyer and Seller) and constitutes (along with the Disclosure Letter, Exhibits and other documents delivered pursuant to this Agreement) a complete and exclusive statement of the terms of the agreement between the parties with respect to its subject matter. This Agreement may not be amended, supplemented or otherwise modified except by a written agreement executed by the party to be charged with the amendment.**

**(b) Except for the representations and warranties contained in Article 3 [the representations and warranties section of the Agreement], none of Seller or any Shareholder has made any representation or warranty, expressed or implied, as to Seller or as to the accuracy or completeness of any information regarding Seller furnished or made available to Buyer and its representatives, and none of Seller or any Shareholder shall have or be subject to any liability to Buyer or any other Person resulting from the furnishing to Buyer, or Buyer's use of or reliance on, any such information or any information, documents or material made available to Buyer in any form in expectation of, or in connection with, the transactions contemplated by this Agreement.**

**(c) Following the Closing, the sole and exclusive remedy for any and all claims arising under, out of, or related to this Agreement, or the sale and purchase of the Seller, shall be the rights of indemnification set forth in Article 11 [the indemnification section of the Agreement] only, and no person will have any other entitlement, remedy or recourse, whether in contract, tort or otherwise, it being agreed that all of such other remedies, entitlements and recourse are expressly waived and released by the parties hereto to the fullest extent permitted by law.**

**(d) The provisions of this Section 13.7 [the entire agreement provision] and the limited remedies provided in Article 11, were specifically bargained for between Buyer and Sellers and were taken into account by**

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<sup>13</sup> See Comment to Section 11.11 on pp 259-262 of Byron F. Egan, *Acquisition Structure Decision Tree*, TexasBarCLE & Business Law Section of State Bar of Texas, Choice & Acquisition of Entities in Texas Course, San Antonio, TX, May 24, 2013, <http://www.jw.com/publications/article/1844>, regarding the express negligence doctrine.

**Buyer and the Sellers in arriving at the Purchase Price. The Sellers have specifically relied upon the provisions of this Section 13.7 and the limited remedies provided in Article 11 in agreeing to the Purchase Price and in agreeing to provide the specific representations and warranties set forth herein.<sup>14</sup>**

**(e) All claims or causes of action (whether in contract or in tort, in law or in equity) that may be based upon, arise out of or relate to this Agreement, or the negotiation, execution or performance of this Agreement (including any representation or warranty, whether written or oral, made in or in connection with this Agreement or as an inducement to enter into this Agreement), may be made only against the entities that are expressly identified as parties hereto. No Person who is not a named party to this Agreement, including without limitation any director, officer, employee, incorporator, member, partner, stockholder, Affiliate, agent, attorney or representative of any named party to this Agreement (“Non-Party Affiliates”), shall have any liability (whether in contract or in tort, in law or in equity, or based upon any theory that seeks to impose liability of an entity party against its owners or affiliates) for any obligations or liabilities arising under, in connection with or related to this Agreement or for any claim based on, in respect of, or by reason of this Agreement or its negotiation or execution; and each party hereto waives and releases all such liabilities, claims and obligations against any such Non-Party Affiliates. Non-Party Affiliates are expressly intended as third party beneficiaries of this provision of this Agreement.**

**(f) This Agreement may not be amended, supplemented or otherwise modified except by a written agreement executed by the party to be charged with the amendment.**

While the foregoing provision is lengthy and is intended to address the concerns expressed by the courts in the *Italian Cowboy*, *Allen* and *Staton Holdings* cases, circumstances and future cases will no doubt suggest revision of the foregoing in particular cases.

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<sup>14</sup> This alternative is derived from the Model Provisions suggested in Glenn D. West and W. Benton Lewis, Jr., *Contracting to Avoid Extra-Contractual Liability—Can Your Contractual Deal Ever Really Be the “Entire” Deal?*, 64 Bus. Law. 999, 1038 (Aug. 2009), as well as the *Italian Cowboy*, *Allen* and *Staton Holdings* discussed above; see Byron F. Egan, Patricia O. Vella and Glenn D. West, *Contractual Limitations on Seller Liability in M&A Agreements*, University of Texas School of Law 7th Annual Mergers and Acquisitions Institute, Dallas, TX, October 20, 2011, at Appendix B, available at <http://images.jw.com/com/publications/1669.pdf>.

### III. De Facto Standstill

In *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*,<sup>15</sup> the Delaware Supreme Court upheld a pair of NDAs and temporarily enjoined Martin Marietta Materials from prosecuting a proxy contest and proceeding with a hostile bid for its industry rival Vulcan Materials Company. After years of communications regarding interest in a friendly transaction, Vulcan and Martin Marietta in the spring of 2010 executed two NDAs to enable their merger and antitrust discussions, each governed by Delaware law:

- A general non-disclosure agreement requiring each party to use the other's confidential information "solely for the purpose of evaluating a Transaction," which was defined as "a possible business combination transaction . . . between" the two companies, and prohibiting disclosure of the other party's evaluation material and of the parties' negotiations except as provided in the agreement, which had a term of two years.
- A joint defense and confidentiality agreement, intended to facilitate antitrust review signed about two weeks after the non-disclosure agreement requiring each party to use the other's confidential information "solely for the purposes of pursuing and completing the Transaction," which was defined as "a potential transaction being discussed by" the parties, and restricting disclosure of confidential materials.

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

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

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

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<sup>15</sup> No. 254,2012, C.A. No. 7102 (Del. July 10, 2012), affirming *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, C.A. 7102-CS (Del. Ch. May 4, 2012). See XVII Deal Points (The Newsletter of the Mergers and Acquisitions Committee of the ABA Bus. L. Sec.) at 23-26 (Summer 2012).

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

#### IV. Express Standstill and "Don't Ask, Don't Waive" Provisions

Some NDAs do contain express standstill provisions that (i) prohibit the bidder from making an offer for the target without an express invitation from its Board and (ii) preclude the bidder from publicly or privately asking the Board to waive the restriction.<sup>16</sup> Such provisions in NDAs, which are sometimes referred to as "Don't Ask, Don't Waive" provisions, are designed to extract the highest possible offer from the bidder because the bidder only has one opportunity to make an offer for the target unless the target invites the bidder to make another offer *sua sponte*.<sup>17</sup> Bidders who do not execute NDAs with "Don't Ask, Don't Waive" provisions generally are not precluded from submitting multiple offers for the company, even after a winning bidder emerges from an auction.<sup>18</sup>

The legitimacy of "Don't Ask, Don't Waive" provisions was recognized in *In re Topps Co. Shareholders Litigation*,<sup>19</sup> in which Chancellor (then Vice Chancellor) Strine enjoined a stockholder vote on a merger until the target waived a standstill agreement. The target's Board had refused to waive the standstill in order to permit a strategic rival to make a tender offer on the same terms it had proposed to the Board and to communicate with Topps stockholders in connection with the vote on the proposed transaction the Board had approved with a private equity investor. In holding that the Board was misusing the standstill agreement solely in order to deny its stockholders the opportunity to accept an arguably more attractive deal and to preclude them from receiving additional information about rival's version of events, the Court wrote that standstill agreements can have legitimate purposes, including in the final round of an auction where a Board in good faith seeks to extract the last dollar from the remaining bidders, but can be subject to abuse:

"Standstills serve legitimate purposes. When a corporation is running a sale process, it is responsible, if not mandated, for the board to ensure that confidential information is not misused by bidders and advisors whose interests are not aligned with the corporation, to establish rules of the game that promote an orderly auction, and to give the corporation leverage to extract concessions from the parties who seek to make a bid.

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<sup>16</sup> Peter J. Walsh, Jr., Janine M. Salomone and David B. DiDonato, "Don't Ask, Don't Waive" Standstill Provisions: Impermissible Limitation on Director Fiduciary Obligations or Legitimate, Value-Maximizing Tool?, ABA Business Law Section, Business Law Today (January 23, 2013), <http://apps.americanbar.org/buslaw/blt/content/2013/01/delawareinsider.shtml>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *In re Topps Company Shareholders Litigation*, 926 A.2d 58 (Del. Ch. 2007); see also Byron F. Egan, *How Recent Fiduciary Duty Cases Affect Advice to Directors and Officers of Delaware and Texas Corporations*, University of Texas School of Law 35th Annual Conference on Securities Regulation and Business Law, Austin, TX, Feb. 8, 2013, 198-203 nn.641-648, <http://www.jw.com/publications/article/1830>.

“But standstills are also subject to abuse. Parties like Eisner often, as was done here, insist on a standstill as a deal protection. Furthermore, a standstill can be used by a target improperly to favor one bidder over another, not for reasons consistent with stockholder interest, but because managers prefer one bidder for their own motives.”<sup>20</sup>

Later in *In re Celera Corp. Shareholder Litigation*,<sup>21</sup> Vice Chancellor Parsons held that although in isolation the “Don’t Ask, Don’t Waive” provisions arguably fostered the legitimate objectives set forth in *Topps*, when viewed with the no-solicitation provision in the merger agreement, a colorable argument existed that the collective effect created an informational vacuum, increased the risk that directors would lack adequate information, and constituted a breach of fiduciary duty. The Court commented that the “Don’t Ask, Don’t Waive” standstill provisions blocked certain bidders from notifying the Board of their willingness to bid, while the no-solicitation provision in the merger agreement contemporaneously blocked the Board from inquiring further into those parties’ interests, and, thus, diminished the benefits of the Board’s fiduciary-out in the no-solicitation provision and created the possibility that the Board would lack the information necessary to determine whether continued compliance with the merger agreement would violate its fiduciary duty to consider superior offers.

In late 2012, two Chancery Court opinions, *In re Complete Genomics, Inc. Shareholder Litigation*<sup>22</sup> and *In re Ancestry.com Inc. Shareholder Litigation*,<sup>23</sup> considered the propriety of a target company’s inclusion in standstill agreements of a “Don’t Ask, Don’t Waive” provision which became the “emerging issue of December of 2012,” in the words of Chancellor Strine. In *Complete Genomics* the Board of a company in financial straits decided to explore “all potential strategic alternatives,” including initiation of a process to find a buyer. Prospective bidders were required to sign confidentiality agreements, some of which included standstill provisions that prohibited the bidders from launching a hostile takeover and prohibited the prospective bidders from *publicly* asking the Board to waive the standstill restrictions, but one also forbade the prospective bidder from making a *nonpublic* request for such a waiver.<sup>24</sup> In a bench ruling, Vice Chancellor Laster analogized the “Don’t Ask, Don’t Waive” provision (at least insofar as it prohibited *nonpublic* waiver requests) to “bidder-specific no-talk” clauses criticized by the Court of Chancery in previous cases as being violative of the Board’s “duty to take care to be informed of all material information reasonably available,” rendering it the “legal equivalent of willful blindness” to its fiduciary duties.<sup>25</sup> The Vice Chancellor commented that while “a board doesn’t

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<sup>20</sup> 926 A.2d at 91 (Del. Ch. 2007).

<sup>21</sup> C.A. No. 6304-VCP (Del. Ch. Mar. 23 2012) (Transcript), *aff’d in part rev’d in part on other grounds*, 2012 WL 6707746 (Del. Dec. 27, 2012).

<sup>22</sup> Telephonic Oral Argument and the Court’s Ruling, *In re Complete Genomics, Inc. S’holder Litig.*, C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012).

<sup>23</sup> The Court’s Ruling on Plaintiffs’ Motion for Preliminary Injunction, *In re Ancestry.com Inc. S’holder Litig.*, C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012).

<sup>24</sup> Robert S. Reder, *Delaware Chancellor Weighs in on “Don’t Ask, Don’t Waive” Provision of Standstill Agreement*, Bloomberg BNA Corporate Practice Library, 28 CCW 24 (2013).

<sup>25</sup> The Vice Chancellor wrote:

In my view, a Don’t Ask, Don’t Waive Standstill resembles a bidder-specific no-talk clause. In *Phelps Dodge Corporation v. Cyprus Amax* [1999 WL 1054255, at \*2 (Del. Ch. Sept. 27,

necessarily have an obligation to negotiate,” it “does have an ongoing statutory and fiduciary obligation to provide a current, candid and accurate merger recommendation,” which encompasses “an ongoing fiduciary obligation to review and update its recommendation,” and a “Don’t Ask, Don’t Waive” provision in a standstill is “impermissible” to the extent it limits a board’s “ongoing statutory and fiduciary obligations to properly evaluate a competing offer, disclose material information, and make a meaningful merger recommendation to its stockholders.” These are ongoing obligations no matter how pristine the process adopted by the Board in making its initial decision to approve a transaction and recommend it to stockholders.

In *Ancestry.com*, the bidders in an auction initiated by the target were required to sign confidentiality agreements containing standstill restrictions that included “Don’t Ask, Don’t Waive” provisions.<sup>26</sup> The ultimate winner in this process was a private equity firm which did not “demand an assignment” of the provision in the merger agreement, thereby leaving it within the target’s discretion whether or not to allow unsuccessful bidders to make unsolicited topping bids prior to receiving stockholder approval. Chancellor Strine generally praised the process followed by the Ancestry Board, noting that the Board was “trying to create a competitive dynamic” and the process “had a lot of vibrancy and integrity to it ... .” With respect to the “Don’t Ask, Don’t Waive” provision, the Chancellor noted that while it “is a pretty potent provision,” he was aware of “no statute” or “prior ruling of the Court” that rendered such provisions “per se invalid,” and wrote that a “Don’t Ask, Don’t Waive” provision actually may be used by a “well-motivated seller ... as a gavel” for “value-maximizing purposes” by communicating to bidders that “there really is an end to the auction for those who participate,” creating an incentive for bidders to “bid your fullest because if you win, you have the confidence of knowing you actually won that auction at least against the other people in the process,” which may attract prospective bidders to a process that has “credibility so that those final-round bidders know the winner is the winner, at least as to them.”

The Chancellor was, however, troubled by the target’s failure to disclose in proxy materials sent to stockholders the potential impact of the “Don’t Ask, Don’t Waive” provision on the bidding process, warned that directors “better be darn careful” in running an auction process to be sure that “if you’re going to use a powerful tool like that, are you using it consistently with your fiduciary duties, not just of loyalty, but of care.” Chancellor Strine faulted the lack of proxy statement disclosures regarding the “Don’t Ask, Don’t Waive” provision as “probabilistically in violation of the duty of care” since the Board was “not informed about the potency of this clause,” and it “was not used as an auction gavel.” Once the winning bidder “did not demand an assignment of it,” the Board did not “waive it in order to facilitate those bidders which had signed up the standstills being able to make a superior proposal.” The Chancellor “enjoin[ed] the deal subject to those disclosures being promptly made.”

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1999)], Chancellor Chandler considered whether a target board had breached its fiduciary duties by entering into a merger agreement containing a no-talk provision. Unlike a traditional no-shop clause, which permits a target board to communicate with acquirers under limited circumstances, a no-talk clause -- and here I’m quoting from the Chancellor -- “not only prevents a party from soliciting superior offers or providing information to third parties, but also from talking to or holding discussions with third parties.”

<sup>26</sup> Robert S. Reder, *Delaware Chancellor Weighs in on “Don’t Ask, Don’t Waive” Provision of Standstill Agreement*, Bloomberg BNA Corporate Practice Library, 28 CCW 24 (2013).

## **V. Lessons from the Cases**

The cases discussed above teach that even a simple agreement to maintain the confidentiality of information can be enforced in ways that can change the course of a major transaction. Further, the emphasis placed by the Courts on the directors understanding the power of NDA provisions suggests that counsel should consider the implications thereof on the fiduciary duties of directors and help their clients understand them.