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Another Hostile Deal Thwarted by a Confidentiality Agreement

In another case in which a confidentiality agreement stopped a hostile takeover bid, a California court yesterday preliminarily enjoined a bidder on the ground that it misused information in violation of a confidentiality agreement. [*Depomed Inc., v. Horizon Pharma, PLC*, No. 1:15-cv-283834](#), Superior Court of California (Santa Clara Cty. Nov. 19, 2015). The decision joins the landmark 2012 Delaware case of [*Martin Marietta, Inc. v. Vulcan Materials Co.*, 56 A.3d 1072 \(Del Ch. 2012\)](#), *aff'd* [68 A.3d 1208 \(Del. 2012\)](#), as both a rare judicial order blocking a hostile deal based on contract and a powerful reminder that confidentiality agreements in the M&A context can have important unintended consequences.

Unlike *Martin Marietta*, the confidentiality agreement at issue in *Depomed* was not even signed directly between acquirer and target. In 2013, Horizon and Depomed separately considered acquiring the rights to NUCYNTA, a pain medication then owned by Janssen Pharmaceuticals, Inc. Horizon and Depomed both participated in an auction for NUCYNTA and signed confidentiality agreements with Janssen containing customary provisions limiting the use of Janssen proprietary information “solely to evaluate [Horizon’s] interest in pursuing the Business Relationship [with Janseen] and for no other purpose.” Depomed won the auction and acquired the U.S. rights to NUCYNTA in January 2015; it later argued that those rights included rights under the confidentiality agreements signed by the losing bidders, including Horizon.

In July 2015, Horizon launched a hostile bid to acquire Depomed. Depomed sued for injunctive relief, asserting that Horizon was improperly using information related to NUCYNTA in evaluating and prosecuting its hostile bid. Among other things, Depomed argued that many of the same advisors who worked on the hostile bid were also present during the diligence on NUCYNTA. In response, Horizon contended that its obligations of confidentiality were limited to discussion of a different transaction structure, that it never breached the agreement, and that Depomed lacked standing to sue in any case, because it had never acquired Janssen’s rights under the confidentiality agreement.

The judge disagreed. In a brief ruling applying the plain terms of the agreement, the court blocked the bid, which Horizon then immediately abandoned. The ruling is a reminder of the lessons of *Martin Marietta* and the serious obligations attendant to confidentiality agreements, especially where the possibility of assigning such agreements can transform the nature of the original obligation. Parties who ignore such “boilerplate” contracts do so at their peril.

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