

Hostile bid prevented by confidentiality agreement

March 16 2016 | Contributed by [Ropes & Gray LLP](#)

Facts

Decision

Comment

On November 20 2015, in *Depomed, Inc v Horizon Pharma, PLC*,⁽¹⁾ the California Superior Court issued a preliminary injunction prohibiting Horizon Pharma, PLC from pursuing its hostile bid to acquire Depomed, Inc.

Facts

Horizon and Depomed had both participated in an auction process during 2014-2015 to acquire the rights to the pain relief drug Nucynta, which was at the time owned by Janssen (a subsidiary of Johnson & Johnson). Depomed won the bid and acquired the rights to Nucynta from Janssen in April 2015. Before the auction process, Horizon and Janssen had entered into a mutual confidentiality agreement regarding "a contemplated co-promotion of products", with Janssen to promote Horizon's drug Duexis and Horizon to promote Nucynta. The confidentiality agreement protected confidential information regarding "a potential commercial business arrangement, specifically a co-promotion arrangement whereby HORIZON would co-promote JANSSEN's NUCYNTA® drug product in the United States". Janssen ultimately elected not to pursue that co-promotion and notified Horizon of its decision in early 2014. In connection with the auction process, Horizon and Janssen did not enter into a new confidentiality agreement. Although Horizon suggested to Janssen that the terms of the confidentiality agreement be amended to address the new auction process specifically, no amendment was ever formally made and the parties did not enter into a separate confidentiality agreement. However, Depomed submitted evidence that subsequent correspondence between Horizon and Janssen indicated that the two intended that the confidentiality agreement would nonetheless apply to the auction process.

In July 2015 Horizon launched a hostile bid to acquire Depomed. Depomed sought injunctive relief and claimed that Horizon was improperly using confidential information obtained from Janssen when it participated in the auction for Nucynta. Horizon claimed that:

- Horizon's obligations of confidentiality were limited to discussions related to the potential copromotion transaction;
- it never breached the agreement in its pursuit of the hostile bid; and
- Depomed lacked standing because it had never acquired Janssen's rights under the confidentiality agreement since the confidentiality was not specifically identified as a transferred asset under the purchase agreement.

Decision

The California Superior Court found Depomed's claims were likely to prevail and it granted the preliminary injunction. Horizon withdrew its \$1 billion hostile bid following the ruling.

Comment

This decision bears great resemblance to the 2012 *Martin Marietta* decision,⁽²⁾ where the Delaware Court of Chancery blocked a hostile bid because of a violation of a confidentiality agreement, and

AUTHORS

[Patrick Diaz](#)



[Hunter Sharp](#)



provides a couple of important reminders for the prospective acquirer or seller of a business:

- It is important for a company to monitor carefully the confidentiality agreements that it enters into in the course of its business, especially those relating to the evaluation of potential acquisitions and other business ventures. In particular, a company should keep track of the counterparties to which it owes obligations regarding confidentiality, as well as the use restrictions for which it may use the confidential information it receives.
- In anticipation of the potential need to assign rights under confidentiality agreements to a future acquirer of all or a part of its business, a potential seller should consider including in the ordinary course a provision in its confidentiality agreements expressly providing for the assignability, in whole or in part, of such seller's rights under the confidentiality agreement to the purchaser of the assets to which such agreement relates, without the need for obtaining the consent of the other party to the confidentiality agreement. In doing so, the acquirer must consider the scope of information to be disclosed as part of the sale process and whether any such information relates in whole or in part to retained assets to ensure that rights are not inadvertently assigned with respect to any retained assets in a sale of only a portion of the seller's business.

For further information on this topic please contact [Patrick Diaz](mailto:patrick.diaz@ropesgray.com) at Ropes & Gray LLP's Boston office by telephone (+1 617 951 7000) or email (patrick.diaz@ropesgray.com). Alternatively, contact [Hunter Sharp](mailto:hunter.sharp@ropesgray.com) at Ropes & Gray's Chicago office by telephone (+1 312 845 1200) or email (hunter.sharp@ropesgray.com). The Ropes & Gray website can be accessed at www.ropesgray.com.

Endnotes

(1) *Depomed Inc. v Horizon Pharma, PLC*, No 1:15-cv-283834 (Cal Super Ct November 18 2015).

(2) *Martin Marietta Inc. v Vulcan Materials Co*, 56 A.3d 1072 (Del Ch 2012).

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).