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Quarterly Corporate / M&A Decisions Update

Below is our Quarterly Corporate / M&A Decisions Update for decisions in Q3 2018 and selected others. This update is designed to highlight selected important M&A, corporate and commercial court decisions on a quarterly basis. Brief summaries of each decision appear below with links to more robust discussions. Please contact us with any questions.

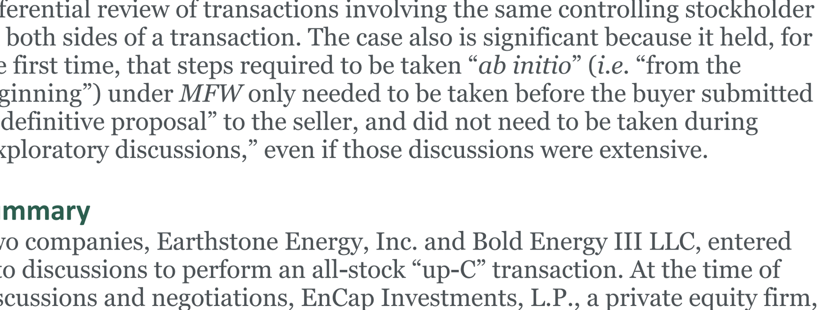
*Please click **HERE** for discussion of key decisions from Q2 2018.*

Penton Business Media Holdings LLC v. Informa PLC,
Del Ch., C.A. No. 2017-0487-VCL (Del. Ch. July 9, 2018)

Why is it important
In *Penton Business Media Holdings LLC v. Informa*, the Delaware Court of Chancery delineated the difference between choosing to have a dispute decided by an expert versus choosing to have a dispute decided by an arbitrator. Unlike some jurisdictions, Delaware recognizes a distinction between the types of evidence and legal arguments experts and arbitrators can consider. *Penton* highlights the importance of carefully considering the differences between the various dispute resolution mechanisms available to contracting parties, and the need to clearly articulate in the agreement which mechanism has been selected.

Summary
In a post-merger dispute concerning the calculation of merger-related tax benefits, the court addressed whether the accountant appointed to resolve the parties' tax dispute constituted an expert or an arbitrator. The court found that the plain language of the agreement expressly called for an expert determination and that, as an expert, the accountant did not have the authority to resolve legal disputes over the interpretation of the parties' merger agreement. As a result, it was up to the court to resolve the parties' underlying legal dispute over whether the appointed accountant could consider extrinsic evidence in resolving the parties' dispute over the treatment of merger-related tax benefits. The court found that the plain language of the agreement provided that the accountant could not consider extrinsic evidence.

*Please click **HERE** for a more detailed discussion of this case.*



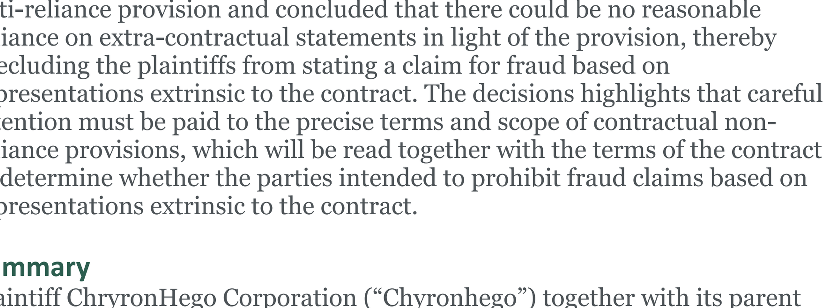
Olenik v. Lodzinski,
C.A. No. 2017-0414-JRS (Del. Ch. July 20, 2018)

Why is it important
In *Olenik v. Lodzinski*, the Delaware Court of Chancery granted a motion to dismiss a challenge to a controlling shareholder transaction because the transaction was structured to conform with the framework set out by the Delaware Supreme Court in *Khan v. M & F Worldwide Corp* ("*MFW*"). The case provides important guidance on the steps companies may take to ensure deferential review of transactions involving the same controlling stockholder on both sides of a transaction. The case also is significant because it held, for the first time, that steps required to be taken "*ab initio*" (*i.e.* "from the beginning") under *MFW* only needed to be taken before the buyer submitted a "definitive proposal" to the seller, and did not need to be taken during "exploratory discussions," even if those discussions were extensive.

Summary
Two companies, Earthstone Energy, Inc. and Bold Energy III LLC, entered into discussions to perform an all-stock "up-C" transaction. At the time of discussions and negotiations, EnCap Investments, L.P., a private equity firm, allegedly held controlling interests in both Earthstone and Bold. Following ten months of preliminary discussions, Earthstone formed a special committee of the board to negotiate and approve the transaction, attempting to follow the framework for avoiding heightened review of the contemplated transaction established in *MFW*. The special committee spent three months negotiating with Bold and ultimately approved the deal. A super majority of disinterested stockholders then approved the deal following the release of a detailed proxy statement. An Earthstone stockholder brought claims against Earthstone, Bold, EnCap, and Earthstone management for breach of fiduciary duties and other related claims. The defendants moved to dismiss the claim.

The court granted the defendants' motion to dismiss, finding that the ten months of discussions that occurred before Earthstone formed a special committee to review the deal were "exploratory" and did not constitute "negotiations" under *MFW*, which requires that a special committee be in place before negotiations begin. The court also rejected the plaintiff's arguments that the special committee was not a "well functioning committee" because it was not independent, and that the committee did not exercise due care. Because the *MFW* framework was met, the court reviewed the allegations using the highly deferential business judgment standard and dismissed all claims because there was no indication the transaction constituted corporate waste.

*Please click **HERE** for a more detailed discussion of this case.*



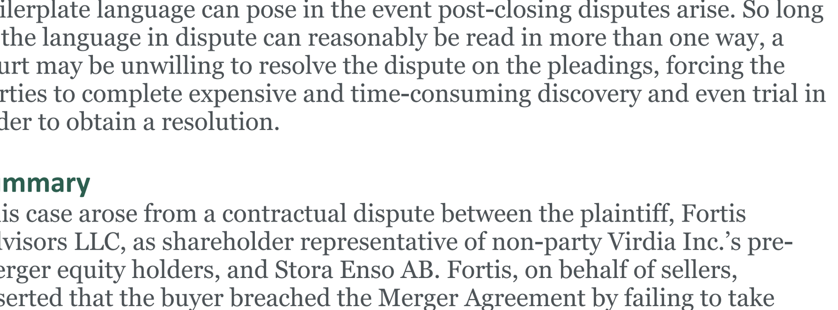
Chyronhego Corporation, et al. v. Cliff Wight et al.,
C.A. No. 2017-0548-SG (Del. Ch. July 31, 2018)

Why is it important
In an effort to limit their liability for fraud, sellers often include contractual disclaimers or non-reliance language in purchase agreements. These provisions typically state that the buyers agree that they are not relying on any representations other than those found in the contract. In *Chyronhego Corporation, et al. v. Cliff Wight et al.*, the court examined the scope of an anti-reliance provision and concluded that there could be no reasonable reliance on extra-contractual statements in light of the provision, thereby precluding the plaintiffs from stating a claim for fraud based on representations extrinsic to the contract. The decisions highlights that careful attention must be paid to the precise terms and scope of contractual non-reliance provisions, which will be read together with the terms of the contract to determine whether the parties intended to prohibit fraud claims based on representations extrinsic to the contract.

Summary
Plaintiff ChryronHego Corporation ("Chyronhego") together with its parent companies (the "Plaintiffs") brought an action against Cliff Wight and CFX Holdings ("Defendants") alleging both fraud and breach of certain representations and warranties. Pursuant to a stock purchase agreement, Defendants sold an electronic-effects company, Click Effects, to ChyronHego for approximately US$12.5 million in cash and equity. Post-closing, Click Effects performed well below Plaintiffs' expectations. Plaintiffs alleged that Wight "committed fraud through misrepresentations in the Stock Purchase Agreement and via misleading documents submitted to the data room," which included falsified financial statements ChyronHego used for company valuation and as the basis of their financial projections.

In response, Defendants argued that a non-reliance disclaimer in the purchase agreement precluded Plaintiffs' claim for fraud. The court agreed, finding that Plaintiffs could not state a claim for extra-contractual fraud because Plaintiffs could not have acted in justifiable reliance on any extra-contractual representation or warranty in light of the non-reliance disclaimer, in combination with several other provisions.

*Please click **HERE** for a more detailed discussion of this case.*



Fortis Advisors LLC v. Stora Enso AB,
C.A. No. 12291-VCS (Del. Ch. Aug. 10, 2018)

Why is it important
In *Fortis Advisors LLC v. Stora Enso AB*, the Delaware Court of Chancery held that it could not resolve a dispute between a seller and a buyer concerning earn-out payments on a motion to dismiss because the relevant language in the merger agreement could be reasonably interpreted in more than one way. The case highlights the dangers imprecise drafting and use of boilerplate language can pose in the event post-closing disputes arise. So long as the language in dispute can reasonably be read in more than one way, a court may be unwilling to resolve the dispute on the pleadings, forcing the parties to complete expensive and time-consuming discovery and even trial in order to obtain a resolution.

Summary
This case arose from a contractual dispute between the plaintiff, Fortis Advisors LLC, as shareholder representative of non-party Virdia Inc.'s pre-merger equity holders, and Stora Enso AB. Fortis, on behalf of sellers, asserted that the buyer breached the Merger Agreement by failing to take steps that were needed for the company to achieve two designated milestones that would have obligated it to make two contingent Milestone Payments of US$12 million and US$17.3 million, respectively. Fortis' claim for breach of contract was based on its contention that Stora Enso AB failed to comply with the specific performance timeline meant to facilitate achievement of the two milestones that would trigger the Milestone Payments, as required by the Merger Agreement. Stora Enso AB moved to dismiss Fortis' claim on the ground that the Merger Agreement did not obligate it to perform under any set timeline. The two parties put forth competing interpretations as to the meaning of the relevant provisions in the Merger Agreement. Finding the constructions proffered by both sides to be reasonable, the court held that it was required to deny the motion to dismiss and allow the case to proceed to discovery.

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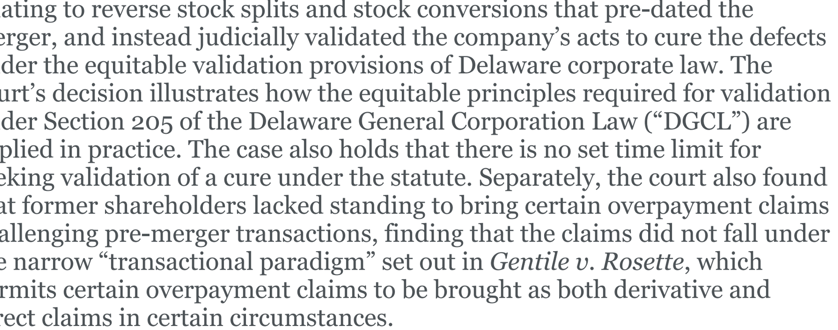

Charles Almond as Trustee for the Almond Family 2001 Trust v. Glenhill Advisors LLC, et al.,
C.A. No. 10477-CB (Del. Ch. Aug. 17, 2018) (Bouchard, C.)

Why is it important
In its post-trial opinion in *Charles Almond as Trustee for the Almond Family 2001 Trust v. Glenhill Advisors LLC, et al.*, the Delaware Court of Chancery rejected challenges to a merger transaction based on defective corporate acts relating to reverse stock splits and stock conversions that pre-dated the merger, and instead judicially validated the company's acts to cure the defects under the equitable validation provisions of Delaware corporate law. The court's decision illustrates how the equitable principles required for validation under Section 205 of the Delaware General Corporation Law ("DGCL") are applied in practice. The case also holds that there is no set time limit for seeking validation of a cure under the statute. Separately, the court also found that former shareholders lacked standing to bring certain overpayment claims challenging pre-merger transactions, finding that the claims did not fall under the narrow "transactional paradigm" set out in *Gentile v. Rosette*, which permits certain overpayment claims to be brought as both derivative and direct claims in certain circumstances.

Summary
Herman Miller, Inc. acquired modern furniture retailer Design Within Reach, Inc. ("DWR" or the "Company") in a July 2014 short-form, third-party merger transaction. The acquisition followed a significant turnaround for the Company that began in August 2009, when a group of investor funds known as Glenhill acquired a controlling interest in DWR, installing a new management team to rehabilitate the company following extraordinary losses tied to the collapse of the housing market in 2008.

Following the closing, former DWR stockholders brought suit challenging the merger as defective. The claims related to rehabilitative efforts Glenhill had implemented as part of their turnaround plan, including certain reverse stock splits, conversions, and other equity-issuing transactions. Unbeknownst to Glenhill or DWR's Board of Directors (the "Board") at the time, these transactions were defectively implemented, resulting in the "double dilution" of the split-and-converted common stock and Series A convertible preferred stock (the "Series A Preferred"). These defective corporate acts went unnoticed until after the 2014 merger was consummated.

In their suit, the former DWR stockholders argued that the "double dilution" created by the defective transactions precluded Herman Miller from acquiring the 90 percent equity stake required to implement the short-form merger because the purported number of shares Herman Miller acquired exceeded the number authorized by the Company's governing instruments. Plaintiffs further asserted overpayment claims against individual Board members relating to other pre-merger equity transactions.

In response, Defendants implemented a series of ratification resolutions pursuant Section 204 of the DGCL to cure the challenged defective corporate acts, and filed a counterclaim seeking judicial validation of those defective acts under Section 205. Following a trial, the court ruled in favor of the Company, holding that equitable considerations counseled in favor of validation. The court also held that plaintiffs lacked standing to assert derivative overpayment claims, rejecting their argument that derivative overpayment claims brought by minority stockholders could be treated as direct injuries under the *Gentile v. Rosette* doctrine.

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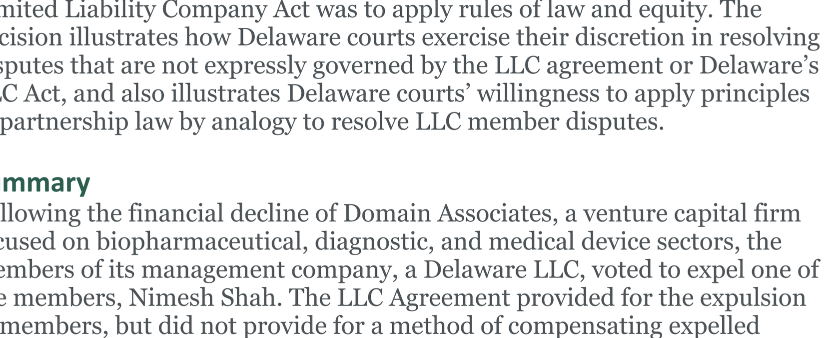

Domain Associates, LLC v. Nimesh S. Shah
(Del. Ch. 2018)

Why is it important
In *Domain Associates, LLC v. Nimesh S. Shah*, the Delaware Court of Chancery ruled that an expelled LLC member was owed the fair value of his member interest where the LLC agreement did not address compensation in the event of expulsion and the only applicable guidance under the Delaware Limited Liability Company Act was to apply rules of law and equity. The decision illustrates how Delaware courts exercise their discretion in resolving disputes that are not expressly governed by the LLC agreement or Delaware's LLC Act, and also illustrates Delaware courts' willingness to apply principles of partnership law by analogy to resolve LLC member disputes.

Summary
Following the financial decline of Domain Associates, a venture capital firm focused on biopharmaceutical, diagnostic, and medical device sectors, the members of its management company, a Delaware LLC, voted to expel one of the members, Nimesh Shah. The LLC Agreement provided for the expulsion of members, but did not provide for a method of compensating expelled members. The LLC members argued that Shah was only entitled to recover his capital account balance (US$438,353.05) following his expulsion. Shah argued that he was entitled to 12.1 percent of the LLC's cash on hand as of his withdrawal (US$1,553,667). The court found that the terms of the LLC Agreement were silent as to the amount due to a member who was compelled to withdraw, and declined to look to extrinsic evidence on the issue, since there were no ambiguous terms to construe. Instead, the court found that pursuant to the Delaware Limited Liability Company Act, the rules of law and equity govern. The court relied on analogous general partnership law and Delaware law's disfavoring of forfeiture to hold that Shaw was owed an amount equal to the fair value of his interest, and that the remaining members were jointly and severally liable with the LLC breaching the LLC Agreement by expelling Shah without making the appropriate payout.

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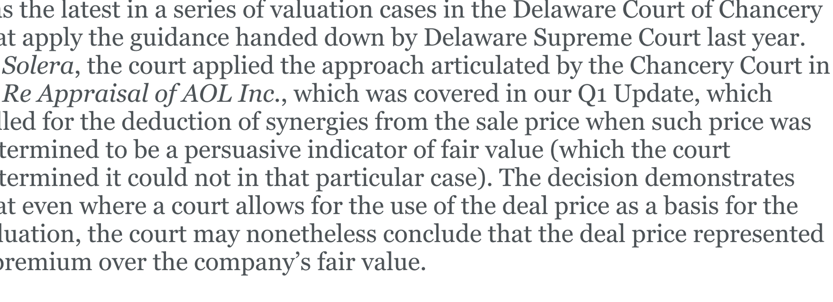

In re Appraisal of Solera Holdings Inc.,
C.A. No. 12080 (Del. Ch. 2018)

Why is it important
In another shareholder appraisal ruling following the Delaware Supreme Court's 2017 decisions in *DFC Global Corp. v. Muirfield Value Partners, L.P.*, and *Dell, Inc. v. Magnetar Global Event Driver Master Fund Ltd.*, the Delaware Court of Chancery in *In re Appraisal of Solera Holdings Inc.* found fair value of the shares to be below the transaction price. The court's decision was the latest in a series of valuation cases in the Delaware Court of Chancery that apply the guidance handed down by Delaware Supreme Court last year. In *Solera*, the court applied the approach articulated by the Chancery Court in *In Re Appraisal of AOL Inc.*, which was covered in our Q1 Update, which called for the deduction of synergies from the sale price when such price was determined to be a persuasive indicator of fair value (which the court determined it could not in that particular case). The decision demonstrates that even where a court allows for the use of the deal price as a basis for the valuation, the court may nonetheless conclude that the deal price represented a premium over the company's fair value.

Summary
In September 2015, Solera Holdings Inc. announced a US$55.85 per-share go-private deal with Vista Equity Partners LP. Certain stockholders were dissatisfied with the price and sought appraisal from the Delaware Court of Chancery. The court thoroughly examined and ultimately rejected the use of both the discounted cash flow analysis proposed by the plaintiff Solera investors, which would have yielded a significantly higher price of US$84.65 per share and the "unaffected market price analysis," proposed by Solera, which would have yielded a significantly lower price of US$36.39 per share. As in *In re Appraisal of AOL Inc.*, the court determined the fair value to be below the transaction price and significantly below the price the plaintiffs had urged. As a result of the court's ruling, Solera investors who sued for appraisal will get US$53.95 per share, representing the deal price minus 3.4 percent, or US$1.90 per share, reflecting "synergies" arising from the merger of the two companies, rather than the US$84.65 per share they had demanded.

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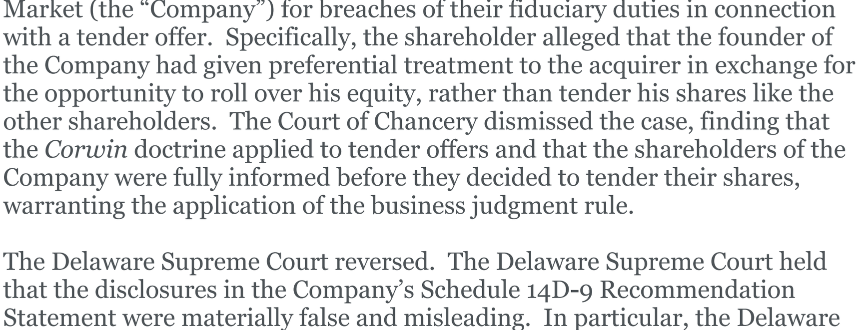

Morrison v. Berry,
191 A.3d 268 (Del. 2018)

Why is it important
In *Morrison v. Berry*, the Delaware Supreme Court reinforced that the *Corwin* doctrine will not be available to "cleanse" fiduciary breaches where shareholders act based on materially misleading or incomplete disclosures.

Summary
In *Morrison*, a shareholder brought suit against the directors of The Fresh Market (the "Company") for breaches of their fiduciary duties in connection with a tender offer. Specifically, the shareholder alleged that the founder of the Company had given preferential treatment to the acquirer in exchange for the opportunity to roll over his equity, rather than tender his shares like the other shareholders. The Court of Chancery dismissed the case, finding that the *Corwin* doctrine applied to tender offers and that the shareholders of the Company were fully informed before they decided to tender their shares, warranting the application of the business judgment rule.

The Delaware Supreme Court reversed. The Delaware Supreme Court held that the disclosures in the Company's Schedule 14D-9 Recommendation Statement were materially false and misleading. In particular, the Delaware Supreme Court found that the Company omitted key information about the founder's agreement with the acquirer concerning the rollover of the founder's equity, the founder's statement that he would not consider an equity rollover with any other buyer, the founder's position that he would sell his shares in the Company if it did not go private, and that the transaction committee was formed to address already existing, not future, shareholder pressure. Based on these false and misleading statements, the Delaware Supreme Court held that while the *Corwin* doctrine could apply to tender offers, it did not apply in this instance because the shareholders were not fully informed.

*Please click **HERE** for a more detailed discussion of this case.*