IN THE SUPREME COURT OF THE STATE OF DELAWARE

FORTIS ADVISORS, LLC, solely in its capacity as representative of former stockholders of Auris Health, Inc., Plaintiff-Below/Appellee, v. JOHNSON & JOHNSON, ETHICON, INC., ALEX GORSKY, ASHLEY MCEVOY, PETER SHEN, and SUSAN MORANO, Defendants-Below/Appellants.	No. 490, 2024 On Appeal from a Decision of the Court of Chancery of the State of Delaware C.A. No. 2020-0881-LWW

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF APPELLANTS

Dated: February 7, 2025

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INTRODUCTION AND INTEREST OF AMICUS

a. The decision below is alarming. Interpreting a carefully negotiated, precisely structured merger earnout provision, the Court of Chancery found Johnson & Johnson liable for over a billion dollars in damages—the largest damages award in an earnout case in Delaware history. The court did so based on terms it acknowledged were not in in the agreement's text. Instead, it created new obligations out of whole cloth, disregarding the provision's allocation of risk to put Johnson & Johnson on the hook for changes in regulatory circumstances well within the parties' contemplation during negotiations. In doing so, it played Monday morning quarterback.

That is not how courts are meant to interpret contracts. And it is especially concerning for the Court of Chancery to depart from the established standards of contract interpretation. After all, millions of corporations entrust Delaware's legal system to give effect to agreements exactly as negotiated, often with billions of dollars at stake—and rightly so. Corporations have long prized Delaware law and Delaware courts for the certainty they offer, allowing businesses to accurately assess legal risk and forge ahead with a clear understanding of their contractual rights and obligations. Throughout the economy, and within the medical technology industry especially, the ability to contract with certainty is profoundly important. That confidence has produced tremendous economic success on a global scale, particularly in the realm of merger and acquisition agreements.

That trust is now shaken. Here, the earnout provision meticulously allocated risk among the parties and precisely explained Johnson & Johnson's obligations.

Johnson & Johnson had every reason to expect that its adherence to the contract's terms would protect it from devastating liability. It could not have predicted that the Court of Chancery would simply rewrite the contract, inserting never-contemplated terms to support a billion-dollar judgment. If the decision is left standing, the only thing companies can be certain of moving forward is chaos. That outcome will suffocate mergers and acquisitions—particularly in the medical technology industry—and it may well force companies to incorporate outside of Delaware altogether.

b. This appeal is thus tremendously important to the National Association of Manufacturers ("the NAM") and its many Delaware-incorporated members. The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 13 million men and women, contributes $2.93 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NAM counts among its members numerous companies incorporated in Delaware. Manufacturers across all sectors count on courts—especially Delaware courts—to give effect to contract provisions precisely as written. Only in such a legal environment can the NAM's members enjoy the certainty necessary to make business decisions affecting millions of jobs and trillions of dollars of economic output.

In particular, the NAM's members are frequent parties to merger and acquisition agreements, which often include earnout provisions. The NAM urges the Court to reverse the decision below and restore manufacturers' confidence in the long-treasured certainty traditionally found in Delaware courts and Delaware law.

ARGUMENT

I. THE COURT BELOW IMPERMISSIBLY REWROTE THE AGREEMENT.

A. Earnouts are carefully negotiated contract terms and are essential risk-mitigation components of many merger and acquisition agreements.

1. Mergers and acquisitions are essential to a prospering economy. In 2024, they contributed $3.4 trillion to the global economy, including $1.7 trillion in the United States. Marie-Laure Keyrouz et al., *M&A Highlights 2024: Return to growth*, ION Analytics (Dec. 18, 2024), https://perma.cc/U4PR-5STN. And even "[t]he U.S. antitrust agencies have repeatedly acknowledged since at least 1984 that 'a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.'" Maureen K. Ohlhausen & Taylor M. Owings, *Evidence of Efficiencies in Consummated Mergers* at 1 & n.2 (June 1, 2023) https://perma.cc/E6XX-CFJ6 (quoting U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines 1 (2010)). In addition to promoting efficiency, mergers and acquisitions reward innovators while allowing well-resourced buyers to add value so that promising ideas can reach their full potential. And the competitive drive to acquire and manage a firm "drive[s] consumer welfare" by pushing businesses to "compet[e] to offer superior products and services at better prices." Keynote of Federal Trade Commissioner Noah Philips, *Competing for Companies: How M&A Drives Competition and Consumer Welfare*,

The Global Antitrust Economics Conference at 5 (May 31, 2019), available at https://perma.cc/FH53-UEHZ. Indeed, considerable "[e]mpirical evidence corroborates that the market for corporate control generates value for shareholders, and not at cost to consumers." *Id.* at 9 & n. 19 (citing numerous studies).

These transactions thus push our society forward, developing new technology, creating jobs, and generating economic growth. At the same time, these high potential rewards come at some risk for the parties involved. Buyers cannot be certain that their investment will pan out, as unforeseen regulatory hurdles or changes in market conditions can turn a once-promising acquisition into a dud. And sellers may be wary of leaving money on the table in the case of a premature sale.

Increasingly, parties "rely upon earnout provisions in merger agreements to resolve the problem of uncertainty." Brian JM Quinn, *Putting Your Money Where Your Mouth Is: The Performance of Earnouts in Corporate Acquisitions*, 81 U. of Cincinnati L. Rev. 127, 128 (2013). They are especially "prevalent in transactions involving sellers in . . . medical devices and the pharmaceutical industry" (*id.* at 160) where "the future value of the seller is tied to events that are not yet known or there is still hidden information with respect to the viability of the seller's product to achieve government approval" (*id.* at 153). Indeed, "[m]ore than 80 percent of all deals in the pharmaceutical, medical device and biotech industries include an earnout structure." Kristian Werling et al., *"Commercially Reasonable Efforts" Diligence Obligations in Life Science M&A*, 18 The M&A Lawyer 16, 16 (June 2014). And often "the earnout consideration can far exceed the up-front payment to the sellers."

Id.; *see also* Quinn, *Putting Your Money Where Your Mouth Is* at 153 (on average, earnouts constitute 68.5% of the value in pharmaceutical transactions). Outside life sciences, earnouts are increasing in popularity across sectors. *See, e.g.,* Gail Weinstein et al., *Earnouts Update 2023*, Harvard Law School Forum on Corporate Governance (Nov. 29, 2023) https://perma.cc/56V6-G7GW (documenting a high-water mark of 43% of all deals including earnouts in 2022, compared to pre-pandemic levels around 20%).

Earnouts are designed to smooth over risk and embolden parties on both sides of a potential merger to move forward, especially where, absent an earnout, "uncertainty may form a barrier to successful contracting because buyers and sellers may be unable to efficiently price the seller's asset" because "parties have fundamentally different views of the future or different preferences for risk." Quinn, *Putting Your Money Where Your Mouth Is* at 140. In other words, earnouts "bridge valuation expectations between buyers and sellers." Weinstein, *Earnouts Update 2023*. They help align incentives by carefully allocating risk—buyers can hedge by paying less up front, and sellers get extra if all goes according to plan. Thus, among the principal virtues of an earnout is certainty: parties cannot know what the future holds, but an earnout allows them to at least know their rights and obligations when the future arrives. For these reasons, it is essential for courts—especially Delaware courts—to faithfully enforce earnouts as written.

2. Though each earnout provision is, of course, unique, certain features are well known and recur frequently. *First*, earnouts are generally the product of careful

negotiation, particularly when formed by sophisticated parties who can be expected to choose their words carefully and are highly attuned to risk. Werling, *"Commercially Reasonable Efforts"* at 16. Parties know that much is at stake, and they can be expected to act accordingly. Because the purpose of earnouts, moreover, is to allocate risk, parties engage in those high-stakes negotiations with contingencies, like a change in regulatory environment, front of mind. In interpreting earnouts, courts therefore should not lightly assume from the parties' silence about a possible occurrence that they did not anticipate the risk, much less stray beyond the contractual language to guess at what the parties 'actually' wanted.

Second, the "focus" of earnout negotiations "typically comes to rest on the obligation[s] of a buyer" "and the related definition of this obligation in transaction documentation." Werling, *"Commercially Reasonable Efforts"* at 16. The provision will typically describe, in precise detail, the efforts a buyer must undertake towards achieving designated milestones. Accordingly, the detailed definition of the buyer's expected effort is the most relevant datapoint for assessing the parties' expectations and judging the buyer's later conduct.

Third, in defining the buyer's required efforts, earnout provisions often include a yardstick against which to measure a buyer's decision-making. *See* Werling, *"Commercially Reasonable Efforts"* at 16-17. That standard can look outward, "appl[ying] an industry-standard requirement or look[ing] to other participants in the industry to define the diligence obligations of the buyer." *Id.* Or it can look inward, "appl[ying] the buyer's own standard for undertaking research, regulatory approvals,

and sales and marketing efforts." *Id.* at 17. Naturally, an outward-looking standard is generally more seller-friendly, whereas an inward-looking standard is generally more buyer-friendly. *Id.*

3. Johnson & Johnson acquired Auris for an upfront payment of $3.4 billion. Though Auris's technology showed promise, it was still in development at the time of acquisition. Its success, of course, was far from guaranteed, particularly given the technological and regulatory complexity at play. The parties thus negotiated an earnout provision providing additional consideration of up to $2.35 billion if iPlatform and Monarch surgical robots met a series of milestones, including eight regulatory milestones. The milestones were "ambitious." Op.2. To Johnson & Johnson, Auris executives estimated only a 65% chance of achieving the first milestone. Op.63. Privately, they expressed extreme skepticism, calling the milestones "crazy" and "unlikely to be hit." J&J Br. at 12-13.

These milestones contemplated one form of regulatory approval: 510(k) clearance, which allows medical device sellers to market their device by demonstrating that it is substantially equivalent to an existing "predicate" device. *See* 21 U.S.C. § 360(k). Here, because both parties were sophisticated healthcare companies, the parties were certainly aware that the availability of 510(k) clearance would depend on the FDA's recognition of a predicate device and that other pathways for regulatory approval, such as the De Novo pathway, were also potentially available, and might even become required. The choice to designate 510(k) clearance alone was thus a meaningful, well-considered choice.

It was also a rational choice. Since its introduction in 1976, the 510(k) pathway "has been the most widely employed regulatory pathway" for bringing medical devices to market. Mateo Abboy et al., *Beyond the 510(k): The regulation of novel moderate-risk medical devices, intellectual property considerations, and innovation incentives in the FDA's De Novo pathway*, 7 npj Digital Medicine 1, 1 (2024). Indeed, "[o]f the >155,000 devices approved or cleared by the FDA since 1976, ~99% used the 510(k) pathway." By comparison, the De Novo pathway has been "rarely used" since its creation in 1997—fewer than 400 devices had obtained approval through this pathway as of August 2023—leaving "outstanding questions" and "lingering uncertainty for medical device innovators," even once the FDA finally began to develop regulatory guidance in 2017. *Id.* at 2-3. That uncertainty surrounding the De Novo pathway, alone, is enough to explain the parties' decision to specifically pursue 510(k) clearance and, by implication, eschew De Novo approval.

Moreover, the average wait time for a De Novo application is 338 days, 2.3 times longer than the average 510(k) review time, with some reviews languishing for *30 months*. *Id.* at 3. And the FDA is nearly twice as likely to clear 510(k) submissions as De Novo submissions. *See* J&J Br. at 12. To that end, even the FDA has described the 510(k) approval pathway as "less burdensome" than the De Novo pathway. *Medical Device De Novo Classification Process*, Food & Drug Administration, 86 Fed. Reg. 54,826, 54,836 (Oct. 5, 2021). Experts agree. *See, e.g.,* Jason Van Batavia and Seth Goldenberg, *FDA Device Regulation: 510(k), PMA*, Academic Entrepreneurship for Medical and Health Scientists (Sept. 30, 2019),

https://perma.cc/S358-VUY9 (stating that "the 510(k) pathway is often quicker, less costly, and requires less robust, if any, clinical evidence," than other pathways and that De Novo clearance "typically requires higher standards of evidence or data for safety and efficacy than a traditional 510(k)" submission). As Johnson and Johnson's brief demonstrates, the record fully reflects the uncertainty and risk that accompanies pursuing De Novo clearance rather than 510(k) clearance. J&J Br. at 12, 17-18.

The terms of the earnout provision made clear that Johnson & Johnson had significant discretion to make decisions about iPlatform, without having to move heaven and earth to obtain 510(k) clearance. Most importantly, the contract listed numerous factors that Johnson & Johnson could consider, including: (1) "the likelihood and difficulty of obtaining FDA and other regulatory approval given the nature of the product and the regulatory structure involved"; (2) "the regulatory status of the product and scope of any marketing approval"; (3) "input from regulatory experts and any guidance or developments from the FDA or similar Governmental Entity, including as it may affect the data required to obtain premarket approval from the FDA"; and (4) "the expected and actual profitability and return on investment of the product." Op.66 (quoting Merger Agreement § 2.07(e)(ii)). As these considerations show, the parties expected Johnson & Johnson to act based on regulatory and commercial realities, not blinker those realities to obtain regulatory approval.

4. Through no fault of Johnson & Johnson's, the 510(k) pathway ultimately became unavailable to iPlatform after the deal closed. That FDA decision should

have extinguished Johnson & Johnson's earnout obligation for iPlatform: the only regulatory pathway contemplated by the agreement was now impossible.

B. The decision below disregarded the agreement's express terms.

1. The implied covenant of good faith and fair dealing cannot rewrite the contract.

The Court of Chancery agreed—as was obvious from the agreement's plain text—that "the iPlatform General Surgery Milestone expressly contemplates '510(k) premarket notification[],' which was no longer an option for iPlatform post-pathway shift." Op.99. Nor did the court find anything in the agreement providing that if the 510(k) pathway were closed, Johnson & Johnson was nonetheless obligated to pursue regulatory approval through other pathways.

Nonetheless, the court invoked the implied covenant of good faith and fair dealing to decide that "the obvious goal of the General Surgery Milestone was for iPlatform to obtain FDA approval," and thus the agreement implicitly required Johnson & Johnson to pursue other regulatory pathways, specifically the De Novo pathway. Op.99. That was error. Under Delaware Law, it is axiomatic that "[t]he implied covenant of good faith and fair dealing cannot be employed to impose new contract terms that could have been bargained for but were not." *Blaustein v. Lord Baltimore Cap. Corp.*, 84 A.3d 954, 959 (Del. 2014); *see also, e.g.*, *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (courts must "not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal."). Rather, the implied covenant only prevents arbitrary and unreasonable

conduct that "frustrat[es] the fruits of the bargain that the asserting party reasonably expected." *Nemec,* 991 A.2d at 1126. Courts must thus ground their analysis in "the parties' reasonable expectations at the time of contracting." *Id.* The Court of Chancery disregarded these black-letter principles.

The court justified its post-hoc revision by reasoning that "there is no evidence that 510(k) (versus another pathway) was specifically negotiated," surmising from this that the parties overlooked the need to bargain over alternative avenues for regulatory approval "because at the time of the Merger Agreement, a '510(k) process' was the 'only logical pathway for a robotic device.'" Op.99. That reasoning does not adhere to this Court's guidance that courts must "honor the parties' reasonable expectations" at the time of bargaining and that therefore "it is not the proper role of a court to rewrite or supply omitted provisions to a written agreement." *Cincinnati SMSA Ltd. Partnership v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998). In *Cincinnati SMSA*, this Court refused to rewrite a noncompete clause to expand its scope beyond the "unambiguous terms of the Agreement." *Id.* at 993. The parties' apparent failure to expressly consider participation in a closely related, but ultimately distinct, industry did not justify the court in inserting a provision to that effect on the assumption that the parties would have done so themselves had they simply thought of it. *Id.*

So too here. By inferring that the parties overlooked the possibility of Johnson & Johnson needing to pursue a different regulatory pathway—and that the parties would have reasonably expected Johnson & Johnson to do so—the court below

fundamentally misunderstood the nature of earnout negotiations. These provisions are the subject of intense and scrupulous deliberation, with a single-minded focus on allocating risk in the face of contingent events. The parties may not have specifically *mentioned* other regulatory pathways during their negotiations, but that does not mean that these alternative pathways were outside the realm of contemplation at the time of bargaining or that the parties would have agreed, under the bargained-for terms, to pursue more burdensome forms of regulatory approval if necessary.

These parties—both sophisticated companies with extensive medical-device experience—surely would have understood the various pathways available, and their pros and cons. *See Oxbow Carbon & Mins. Holdings, Inc. v. Crestview-Oxbow Acquisition*, 202 A.3d 482, 502 (Del. 2019) ("[T]he implied covenant should not be used as 'an equitable remedy for rebalancing economic interests'—particularly where, as here, the parties are sophisticated business persons or entities." (footnote omitted) (quoting *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *9 (Del. Ch. Nov. 2, 2007))). It would have been no mystery at the time of negotiations that the 510(k) pathway has various advantages over the De Novo pathway—specifically, it applies less demanding standards, takes less time and money, and allows the company to piggyback off a predicate device, and has a far greater likelihood of success. *See supra* 9-10. Likewise, the parties would have known that that in exchange for this greater convenience, 510(k) clearance is available only if the FDA recognizes a predicate device, and regulatory winds can shift.

Indeed, the FDA warned Auris *before* the merger that 510(k) approval might ultimately prove unavailable. J&J Br. at 16.

Understanding these risks, the parties expressly permitted Johnson & Johnson to consider shifting regulatory realities in its exercise of "commercially reasonable efforts." *See* Op.65-66 (quoting Merger Agreement § 2.07(e)(ii)) (defining "commercially reasonable efforts" to include consideration of "the likelihood and difficulty of obtaining FDA and other regulatory approval given the nature of the product and *the regulatory structure involved*" and "input from regulatory experts and *any guidance or developments from the FDA* or similar Governmental Entity, including as it may affect the data required to obtain premarket approval from the FDA" (emphasis added)).

Ultimately, the parties expressly agreed upon a sole regulatory pathway: 510(k) clearance. Simply put, if they had intended to require Johnson & Johnson to pursue other pathways as well, they would have said so. They did not.

2. The decision below improperly relied on hindsight to assess the commercial reasonableness of Johnson & Johnson's actions.

After improperly assigning Johnson & Johnson an implicit obligation to pursue the De Novo pathway, the court below compounded that error by disregarding the agreement's bargained-for standard for assessing Johnson & Johnson's efforts. Instead, it judged those efforts based on hindsight and the court's own business judgment. Though the court nominally acknowledged that the contract required only "commercially reasonable efforts," it did not afford Johnson & Johnson the same

leeway provided in the contract's plain text defining that standard, which expressly allowed Johnson & Johnson to consider factors like the feasibility of obtaining regulatory approval, input from the FDA, the competitive landscape, safety and effectiveness, and the expected return on investment. *See* Op. 65-66 (quoting Merger Agreement § 2.07(e)(ii)).

For instance, the court bemoaned how, in hindsight, Johnson & Johnson's chosen business strategy "caused needless setbacks and resource drains" for iPlatform, but the same decisions proved to be a "boon" for a preexisting Johnson & Johnson program, Verb. Op.70-71. Such post-hoc reasoning is plainly not a valid assessment of the reasonableness of Johnson & Johnson's conduct, as defined by the agreement, at the time those decisions were made. Nor, as Johnson & Johnson's brief shows, is it an accurate assessment of how iPlatform fared under Johnson & Johnson's control—not least because Johnson & Johnson initially *shelved* Verb in favor of iPlatform. *See* J&J Br. at 15, 44-55.

To justify second-guessing Johnson & Johnson in this manner, the court fixated on the agreement's designation of Johnson & Johnson's "'usual practice' for a 'priority medical device'" as the inward-facing yardstick against which to measure the commercial reasonableness of its efforts. Op.62 (quoting Merger Agreement § 2.07(e)(ii)). In reality, the agreement compared Johnson & Johnson's efforts towards Auris's devices with "priority medical device products *of similar commercial potential at a similar stage in product lifecycle.*" Op.65 (quoting Merger Agreement § 2.07(e)(ii)) (emphasis added). But designating iPlatform as a "priority" in the

contract does not mean that Johnson & Johnson had an obligation to pursue regulatory approval for iPlatform through any possible pathway, and at all possible costs. Instead, under the plain terms of the agreement, Johnson & Johnson needed only expend the "commercially reasonable" effort expected of a priority project—a level of effort that expressly allowed Johnson & Johnson to consider the commercial and regulatory realities of the program, and only required Johnson & Johnson to treat the program as it would any other priority program facing similar realities.

For all the reasons Johnson & Johnson explains (*see* J&J Br. at 22-24), the evidence shows that the company exercised the commercially reasonable effort expected towards a priority project, and then some. Indeed, any question of Johnson & Johnson's prioritization of iPlatform is easily answered by its $2.25 billion investment in the company *after* acquiring it, not to mention the massive investments in time and personnel dedicated to making iPlatform succeed—efforts that led Johnson & Johnson employees to recall iPlatform as "mission critical" to the company, the MedTech division's "top priority," and the object of unprecedented investments by the company. *Id.*

II. THE DECISION BELOW UNDERMINES CONFIDENCE IN THE CERTAINTY OF DELAWARE LAW.

A. Companies depend on certainty in Delaware law.

Delaware has long been the incorporation destination of choice for America's publicly traded companies. Indeed, "incorporation decisions are bimodal: public and private firms typically choose between home-state and Delaware incorporation, with

most public firms and large private firms going to Delaware." Brian J. Broughman et al., *Delaware Law as Lingua Franca: Theory and Evidence*, 57 J. L. & Econ. 865, 866 (2014). As a result, 2 million companies are incorporated in Delaware, including 67.7% of the Fortune 500. *See Facts & Myths*, Delaware.gov, https://perma.cc/TRV8-74KF (last visited Jan. 17, 2025).

Though observers have offered numerous explanations for this trend, one predominant explanation is the self-reinforcing network effect of having so many other corporations file in Delaware. *See generally* Sarath Sanga, *Network Effects in Corporate Governance*, 63 J. L. & Econ. 1 (2020); *see also* Brian J. Broughman & Darian M. Ibrahim, *Delaware's Familiarity*, 52 San Diego L. Rev. 273, 300-309 (2015) (discussing empirical support for the value companies place in widespread familiarity with Delaware corporate law). With such a large body of corporate registrants comes a wealth of case law, a broadly understood set of rules, and a well-trained and highly experienced corporate bar and bench. *See, e.g.*, Broughman, *Delaware Law as Lingua Franca* at 866 (one advantage of Delaware registration is "more case law and better legal services" than will be found in the registrant's home state). The value of these "learning benefits," and especially the "reduction in uncertainty" that comes with having a stable, well-established, and widely understood body of case law, cannot be overstated. *Id.* When it comes to high-stakes, billion-dollar deals, companies want to be certain about how courts will interpret and enforce contractual terms.

In other words, Delaware law is "a legal language that all can speak." Broughman, *Delaware Law as Lingua Franca* at 893. That makes Delaware attractive to

corporate registrants because most potential deal partners and "investors around the country [are] relatively . . . familiar with Delaware corporate law." *Id.* All parties can be confident—and on the same page—about what an agreement means. So-called "Delaware fluency" thus "allows a corporate attorney in any state to communicate with most corporate attorneys in that state and other states." *Id.* Any meeting of the minds is that much simpler when all involved share a common legal language.

But these benefits hold true only insofar as contracts written in that language mean what they say. Because corporations nationwide depend on Delaware law, Delaware courts' fidelity to contractual language is of paramount importance. The more Delaware courts pry open contracts and insert unexpressed duties after the fact, or overlook rights and responsibilities that do exist in black and white, the less certainty companies can have in contracting. To speak from the perspective of the nation's manufacturing sector, manufacturers incorporated in Delaware depend every day on their ability to make decisions with certainty that their contracts will be enforced as written. That certainty is essential at every level of doing business, but especially when it comes to the highest-stake, once-in-a-lifetime mergers and acquisitions that truly represent the engine of American innovation and economic prosperity.

Consequently, any decline in certainty represents fewer deals struck, less economic growth stimulated, and fewer jobs created. Maintaining certainty in Delaware contract law is thus a matter of national and global significance.

B. The decision below shakes companies' confidence.

For the reasons described above, as well as in Johnson & Johnson's brief, the decision below made alarming errors of contractual construction. If left to stand, the decision would substantially erode companies' confidence that Delaware law continues to be a language they are able to speak and understand when negotiating high-stakes deals.

Particularly alarming was the court's decision on the implied covenant of good faith and fair dealing. Johnson & Johnson could not have predicted that the court would use the implied covenant to rewrite the contract and impose new obligations clearly beyond what the parties negotiated for in the contract. *See* 11-14, *supra*. Delaware courts, have, time and again, issued strong warnings against using the implied covenant to misconstrue and modify contracts in this way. *See, e.g., Blaustein*, 84 A.3d at 959 (courts should not "impose new contract terms that could have been bargained for but were not"); *Nemec,* 991 A.2d at 1126 (Del. 2010) (courts must "not rewrite the contract"); *Dunlap v. State Farm Fire & Cas. Co.,* 878 A.2d 434, 441 (Del. 2005) ("Existing contract terms control … such that implied good faith cannot be used to circumvent the parties' bargain, or to create a 'free-floating duty … unattached to the underlying legal document.'" (second alteration in original) (quoting *Glenfed Fin. Corp., Com. Fin. Div. v. Penick Corp.*, 647 A.2d 852, 858 (N.J. App. Div. 1994)); *Cincinnati SMSA Ltd. Partnership*, 708 A.2d at 992 (cautioning not to "rewrite" contracts).

If courts can disregard these admonitions, it is simply impossible for contracting parties to predict when a court will (or will not) alter key contractual terms, much less predict the substance of *how* a court will do so. This case encapsulates what is at stake. An earnout provision allows both parties to manage and hedge against risks, so they can ascertain whether the deal is worth making and also understand their rights and obligations moving forward. Allowing the implied covenant of good faith and fair dealing to impose brand new obligations invites through the back door the very chaos the parties attempted to lock out by agreeing to the earnout provision.

Ultimately, if companies can no longer rely on Delaware law and Delaware courts to enforce contracts as written, some will inevitably find it necessary to consider other options for incorporation. Indeed, some scholarship has questioned whether Delaware incorporation remains the default best choice for out-of-state registration, emphasizing, in particular, the risk of volatility in case law. *See, e.g.,* Philip S. Garon et al., *Challenging Delaware's Desirability as a Haven for Incorporation*, 32 William Mitchell L. Rev. 769 (2006) (cautioning about an increasing "lack of predictability for corporations attempting to comply with Delaware law" particularly with regard to "the tendency of the Delaware courts to reverse (or at least significantly alter) course," occasional "inconsistencies in court decisions" and ambiguities in certain major decisions").

To be perfectly clear, the NAM and its members continue to seriously value the expertise of Delaware courts in resolving high-stakes matters of corporate law. And being able to rely upon the shared fluency of negotiating partners across the

United States in the common language of one state's corporate law is a tremendous asset that has helped efficiently generate economic growth nationwide and across the globe. Because the decision below undermines the predictability of Delaware law—and endangers all the benefits that flow from it—the NAM respectfully asks this Court to reverse.

CONCLUSION

The Court should reverse.

Respectfully submitted.

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