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Case Number 490,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHNSON & JOHNSON and ETHICON, INC.,	§	
	§	No. 490, 2024
	§	
Defendants Below, Appellants,	§	Court Below—Court of Chancery of the State of Delaware
	§	
v.	§	C.A. No. 2020-0881
	§	
FORTIS ADVISORS LLC, solely in its capacity as representative of former stockholders of Auris Health, Inc.,	§	
	§	
	§	
	§	
	§	
Plaintiff Below, Appellee.	§	
	§	

Submitted: February 18, 2025
Decided: February 27, 2025

Before **VALIHURA**, **TRAYNOR** and **LEGROW**, Justices.

ORDER

(1) In 2019, Johnson & Johnson (J&J) acquired Auris Health, Inc., which was developing two surgical robots known as Monarch and iPlatform. In addition to the $3.4 billion that J&J agreed to pay up front, the merger agreement included an earnout component under which J&J agreed to pay $2.35 billion more upon the achievement of certain commercial and regulatory milestones relating to the development of the robots. In a post-trial opinion, the Court of Chancery found that J&J breached its contractual obligations and the implied covenant of good faith and fair dealing as to the iPlatform-related regulatory milestones. The court also found

fraudulent inducement as to one Monarch-related regulatory milestone. The court determined that J&J is liable for nearly $1,000,000,000 in damages.

(2) Currently before the Court are four motions to participate as amici curiae in this appeal from the Court of Chancery's judgment. The appellants consent to the motions. The appellee, Fortis Advisors, LLC, opposes them, arguing that J&J is well represented by counsel and the proposed amicus briefs do not offer unique supplemental assistance to the Court.

(3) Washington Legal Foundation (WLF), "a nonprofit, public-interest law firm and policy center [that] promotes free enterprise, individual rights, limited government, and the rule of law,"[1] supports J&J's position that the Court of Chancery misapplied the implied covenant of good faith and fair dealing and "urge[s] the Court not to allow the implied covenant to drift too far from the contract's text."[2] Fortis argues that the motion should be denied because WLF's brief duplicates J&J's arguments, distorts the Court of Chancery's factual findings, and is substantively identical to a proposed amicus brief that WLF submitted in *Glaxo Group Ltd v. DRIT LP*, Appeal No. 25, 2020, in which the Court denied WLF's motion to participate as amicus curiae.

[1] Proposed Amicus Brief of Non-Party Washington Legal Foundation as Amicus Curiae Supporting Appellants and Reversal, at 1.
[2] *Id.* at 5.

(4) The National Association of Manufacturers (NAM), "the largest manufacturing association in the United States,"[3] argues that the Court of Chancery disregarded the express terms of the merger agreement, rewrote the agreement, and relied on hindsight to evaluate J&J's compliance with the agreement, all of which undermines companies' confidence in the predictability of Delaware law.[4] In opposition to the motion, Fortis argues that NAM's proposed brief merely echoes J&J's arguments and recites "uncontroversial truisms," such as the business need for certainty in Delaware contract law and the economic function of earnout provisions.[5] Fortis also indicates that the chair of NAM's board of directors is a senior executive at J&J.

(5) The Chamber of Commerce of the United States of America (the Chamber), "the world's largest business federation,"[6] emphasizes the differences between the various pathways to Federal Drug Administration authorization for marketing a new medical device and asserts that the Court of Chancery erroneously determined that, by agreeing to contractual terms premised on pursuing the "510(k)" pathway, J&J implicitly obligated itself to pursue authorization under the "De Novo"

[3] Proposed Amicus Curiae Brief of The National Association of Manufacturers in Support of Appellants, at 2.
[4] *Id.* at 4, 11, 16-21.
[5] Appellee's Opposition to Motion of the National Association of Manufacturers for Leave to File Brief as Amicus Curiae, at 2.
[6] Proposed Amicus Curiae Brief of the Chamber of Commerce of the United States of America in Support of Appellants and Reversal, at 1.

pathway.[7] Fortis argues that the Chamber's brief asserts generalizations about average applications under the two pathways that run counter to the Court of Chancery's factual findings about how the 510(k) pathway would have worked as to iPlatform specifically, which factual findings J&J purportedly does not challenge.

(6) Yael V. Hochberg and David T. Robinson, finance professors whose scholarship focuses on entrepreneurial finance and venture capital,[8] "provide their perspective on the economic value of earnout provisions to mergers and acquisitions, the role of milestones in those provisions, and the importance of certainty regarding the milestones on which buyers and sellers have agreed in order for earnouts to best serve their function of enabling value-maximizing transactions."[9] Fortis opposes the motion, arguing that the professors' arguments about the role of earnouts in merger agreements are duplicative of statements in J&J's opening brief and that the professors do not attempt to apply their analyses to the facts of this case.

(7) The privilege to be heard as amicus curiae, as well as the manner and extent of participation, rests within the discretion of the Court.[10] The Court will grant permission to be heard as amicus curiae when the movant possesses "a unique perspective or expertise" in a case involving a question of "general public

[7] *Id.* at 3-4.
[8] Proposed Brief of Professors Tael V. Hochberg and David T. Robinson as Amici Curiae in Support of Neither Party, at 1.
[9] *Id.* at 2.
[10] *Giammalvo v. Sunshine Mining Co.*, 644 A.2d 407, 408 (Del. 1994).

importance" and the Court finds that it would benefit from the movant's "unique supplemental assistance."[11] Unless the movant's ability to provide such assistance is readily apparent, the Court is reluctant to accept an amicus curiae brief where, as in this case, the parties are well represented and the joint consent of the parties is lacking.[12]

(8) The Court recognizes the importance of certainty in Delaware contract law, the limited role of the implied covenant of good faith and fair dealing in contract law, and the function of earnouts in corporate finance. The parties here are sophisticated and well represented by counsel, and J&J is well positioned to effectively argue how the principles addressed in the proposed amicus briefs should apply to the "bespoke"[13] contract in the factual circumstances of this case, which include the regulatory context. For these reasons, the Court has concluded that the proposed amicus briefs do not offer the Court unique supplemental assistance and that the motions should be denied.

[11] *Id.* at 410.
[12] *Id.*
[13] *Fortis Advisors LLC v. Johnson & Johnson*, 2024 WL 4048060, at *2, 24 (Del. Ch. Sept. 4, 2024) (characterizing the earnout provisions as "bespoke").

NOW, THEREFORE, IT IS ORDERED that the motions for leave to file amicus curiae briefs are DENIED.

BY THE COURT:

/s/ Gary F. Traynor
Justice