

Selendy Gay Secures \$1.1 Billion Trial Victory Against Johnson & Johnson

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Selendy Gay and Delaware co-counsel Ross Aronstam & Moritz secured a very significant trial victory on behalf of the former stockholders of Auris Health, Inc (represented by Fortis Advisors) in their long-running earnout dispute with Johnson & Johnson. Following a January trial, Vice Chancellor Lori W. Will of the Delaware Court of Chancery [issued a decision](#) awarding more than \$1.1 billion in damages for J&J's breach of contract, breach of implied covenant, and fraud.

The significant 145-page decision found the former shareholders entitled to the largest earnout-related damages award in Delaware history. *The American Lawyer* and *Law360* have both recognized the victory for its significance.

The dispute stemmed from J&J's acquisition of Auris Health in 2019 and its subsequent actions ensuring that the milestones set forth in the merger agreement would not be achieved, and thus that \$2.35 billion of the merger consideration would never be paid.

Under the terms of the deal, Auris stockholders were to receive these earnout payments upon the achievement of certain regulatory and net sales milestones related to Auris's cutting edge robotically assisted surgical devices. As VC Will found, Auris was "on a path to bring life-changing technologies to market" and that "[l]ed by Dr. Frederic Moll, the visionary architect of robotic surgery, Auris had developed two novel surgical robots in record time: Monarch and iPlatform." VC Will found that "Monarch had unmatched capability to diagnose and treat lung cancer," while "iPlatform took Moll's original market-leading surgical robot to new heights with innovative features for laparoscopic and endoscopic procedures."

VC Will found that immediately after the acquisition, J&J began breaching its contractual obligation to make "commercially reasonable efforts" to meet the iPlatform milestones. She found that "[i]nstead of providing efforts and resources to achieve the regulatory milestones, J&J thrust iPlatform into a head-to-head faceoff" against its own competing laparoscopic robot, Verb, which substantially delayed progress toward iPlatform's regulatory milestones. Moreover, even after J&J decided iPlatform was "the better bet,"

“[t]o salvage its years of investment in Verb, J&J directed that Verb’s hardware and team be added to iPlatform,” effectively turning iPlatform into “a parts shop for Verb.” VC Will found that J&J knew all this would hinder achievement of the regulatory milestones, but “viewed the resulting delays as beneficial since it could avoid making the earnout payment,” and that it then wrote off the iPlatform regulatory milestones “under the pretext of an unforeseen [regulatory] policy change.”

VC Will found that J&J breached its contractual obligations to treat iPlatform as a priority device, to provide efforts in support of the regulatory milestones, and to avoid making decisions based on the contingent payment – “most blatantly when iPlatform was made to compete against and combine with Verb.” She further found that J&J breached the implied covenant of good faith and fair dealing when it failed to devote efforts to achieve the revised regulatory pathway.

In addition, VC Will found that J&J committed fraud to induce Auris to agree to a Monarch milestone involving regulatory clearance using a J&J-developed catheter. “J&J told Auris that this milestone was so certain to be met that J&J viewed the associated payment as up front consideration. J&J neglected to mention that it was under a regulatory investigation because a patient in a clinical study using the catheter had recently died, which put the milestone in doubt.”

VC Will found J&J liable to pay more than \$1.1 billion in damages and interest to “compensate[] Auris’s former stockholders for the earnout payment they would have received absent J&J’s failed efforts and fraud.” She further noted that “[w]hat remains irretrievably lost is the transformative potential of Auris’s robots.”

The Fortis trial team was led by Selendy Gay partners Philippe Z. Selendy, Jennifer Selendy, Sean Baldwin, Oscar Shine, and Will Rathgeber, and included associates Meredith Nelson, Julie Singer, Jeff Zalesin, Nafeesah Attah, Taylor Stone, Jack Collins, Aine Carolan, and Milo Hudson. The team at Ross Aronstam & Moritz LLP was led by Bradley R. Aronstam and Roger S. Stronach.

In a joint statement, Philippe Z. Selendy, Jennifer Selendy, and Sean Baldwin said, “The firm appreciates the exhaustive analysis of the Delaware Court of Chancery in this important matter.”

Read the opinion [here](#).

Attorneys

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- Meredith Nelson
- Oscar Shine
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