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Capturing Value at Exit

The $2.35 Billion Lesson from the Auris Health – Johnson & Johnson Acquisition

A Multidisciplinary Analysis for Founders, CEOs, and Boards on Structuring M&A Transactions to Protect Earned Value

Christopher J. Velis, NACD.DC
Founder, Auris Health (acquired by Johnson & Johnson) · Co-Founder, AEIOU Academy

Dr. Christos Kelepouris, PhD
Fulbright Specialist · UAE-Stanford Innovation Fellow · Co-Founder, AEIOU Academy

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Series Note

This paper is Part 1 of a two-part case study published by AEIOU Academy. Part 1 — *Capturing Value at Exit* — diagnoses the structural failures that produced the Auris earnout outcome, provides the regulatory and governance framework for understanding why they occurred, and equips founders with the tools to avoid repeating them. Part 2 — *The Structural Alternative: How Mechanism Design Replaced Contract Language and Paid $375 Million on Schedule with No Litigation* — presents a proven structural alternative: a transaction in the same industry, with a harder regulatory pathway, that paid in full, on schedule, with no litigation.

Each paper is self-contained. Together they form a complete case study in earnout architecture: what went wrong, and what should have happened instead.

How to Use This Paper

This paper serves multiple audiences. Depending on your role, certain sections will be most relevant:

Founders and CEOs approaching M&A: Begin with the Executive Summary and Part II (The Regulatory Reality), then read Part V (The Lessons) and the Contractual Mechanisms section. The Founder's Checklist is designed for direct use in deal evaluation.

Board Directors of venture-backed companies: Focus on Board Composition and Fiduciary Risk in Part III, the governance lessons in Part V, and the discussion of preference stack dynamics.

Investors and Fund Managers evaluating portfolio exits: The IP Fortress Hypothesis in Part I, the Three Machines framework in Part III, and the Economic Alignment Check in the Checklist address portfolio-level concerns.

Legal Counsel advising on M&A: Part II provides regulatory pathway analysis relevant to earnout structuring. The Contractual Mechanisms section offers specific drafting language. Appendix B provides the complete litigation timeline.

Executive Summary

The Transaction: In February 2019, Johnson & Johnson acquired Auris Health for $3.4 billion in cash plus up to $2.35 billion in contingent earnout payments tied to ten regulatory and commercial milestones.

The Outcome: More than five years of litigation. The Delaware Court of Chancery found breach of contract and fraud, awarding over $1 billion in damages. The Delaware Supreme Court partially reversed in January 2026, holding that founders cannot rely on implied covenants to protect against developments they could have anticipated.[1] After damages recalculation, stockholders are expected to receive approximately $600 million net of legal fees and expenses from the $2.35 billion in contracted earnouts, following a ten-day trial, 33 witnesses, and a State Supreme Court appeal.[2]

The Central Problem: Auris Health's Monarch platform received FDA 510(k) clearance as a bronchoscope, a device for navigating the airways of the lungs. When Johnson & Johnson acquired Auris in 2019, the deal included $2.35 billion in earnout payments contingent on expanding into entirely different anatomical territories: urology, gynecology, gastroenterology, and general abdominal surgery. But the FDA's 510(k) clearance process requires demonstrating "substantial equivalence" to a predicate device already on the market. A bronchoscope predicate provides no regulatory pathway to the kidney, the uterus, or the abdomen. These are fundamentally different anatomical systems with different clinical requirements, different risk profiles, and no established predicate chain. Each new anatomical system requires its own

regulatory program: a separate predicate, a separate 510(k) submission, separate clinical evidence, and separate FDA review. J&J's own subsequent urology clearance in 2022 confirmed this; it required a urology-specific predicate device (the Boston Scientific LithoVue ureteroscope), not the bronchoscopy Monarch.[3] The earnouts were tied to regulatory pathways that each required independent, resource-intensive regulatory programs.

The Strategic Reality: Auris had assembled the most comprehensive non-Intuitive patent portfolio in surgical robotics, representing the only pathway into the market without Intuitive's permission. The $3.4 billion at closing may have secured this irreplaceable IP fortress. The earnouts were structured around device milestones that may not have been the buyer's primary objective.

The Governance Gap: Venture-backed boards often have limited independent representation. When preferred shareholders are made whole at closing, their economic interest in earnout achievement may diminish, while common shareholders (founders, employees) may depend on earnouts for the majority of their returns.

Key Lessons

- Regulatory pathway risk is structural exposure, not a negotiable term
- Understand what the buyer is actually purchasing before accepting contingent consideration
- A clearance in one anatomical system is not a template for another; each requires its own regulatory program
- Examine board incentive alignment when preferred and common interests diverge
- Courts will not save you from gaps you could have anticipated

This Paper Provides

- Analysis of the regulatory, strategic, and governance dynamics that determined the outcome
- Ten principles for structuring M&A transactions to protect founder value
- Specific contractual mechanisms for earnout protection
- A founder's checklist for evaluating earnout-heavy offers

The $3.4 billion at closing may have been the real transaction. The $2.35 billion in earnouts was contingent consideration whose achievability sophisticated parties could assess, and did.

The Exit That Should Not Exist

You sell a company for $3.4 billion in cash. You have press coverage. You have the validation of a global strategic buyer. You have the sentence every founder thinks ends the story: "We sold."

Then you discover the sale price was only the first number.

The second number, up to $2.35 billion, was not a bonus. It was the rest of the deal. It lived behind regulatory milestones, commercial targets, and an "efforts" covenant that sounded reasonable at signing and became surgical at dispute.[4] The milestones required FDA clearances across anatomical systems (urology, gynecology, gastroenterology, abdominal surgery) where each system required its own independent regulatory program with its own predicate device, its own clinical evidence, and its own 510(k) submission.[5]

A bronchoscope predicate, however creatively stretched, provides no regulatory pathway to the kidney, the uterus, or the abdomen.

More than five years later, a Delaware court finds breaches and fraud.[6] A State Supreme Court opinion partially reverses, then delivers a warning that will echo through every earnout negotiation for a generation: "There is no genuine contractual gap for the covenant to fill" when developments could have been anticipated, "even if unlikely."[7]

After a ten-day trial, 33 witnesses, and appeals to the Delaware Supreme Court, stockholders are expected to receive approximately $600 million net of legal fees and expenses[8] from $2.35 billion in contracted earnouts. The legal system worked. It also took the better part of a decade and consumed substantial resources.

Ownership percentage does not equal payout percentage. A headline exit price can be a story you tell yourself while the payout machine tells the truth.

This paper is not about outrage. It is about architecture. It is not about vilifying any party; J&J negotiated rationally in its own interest, as it should. The enemy in this story is not a corporation. The enemy is structural ignorance: the gap between what founders know about building companies and what they know about the machinery that determines whether they capture value at exit.

If you are building or financing a company in a regulated domain, you are already taking Elephant Risk: the inherent difficulty of the product, the science, the market, and the regulatory path. What destroys founder outcomes is usually Structural Risk: the avoidable structural choices you can systematize away if you understand the machinery early enough.

Definitions: Understanding the Platforms

Before proceeding, readers must understand the distinction between three terms that are often conflated:

Auris Health was the company: the corporate entity that raised over $700 million in venture capital and was acquired by Johnson & Johnson in 2019.

Monarch was Auris's bronchoscopy robot: the platform that received FDA 510(k) clearance in 2018 based on substantial equivalence to a Karl Storz bronchoscope. Monarch was a working, cleared product designed for visualization and access to patient airways. It was anatomically specific to the lungs.[9]

iPlatform was Auris's next-generation surgical robot: a more ambitious platform intended for general surgery across multiple anatomical systems. iPlatform was in development at the time of acquisition and had not received FDA clearance. The earnout milestones were primarily tied to iPlatform regulatory achievements, not Monarch extensions.[10]

This distinction is critical. Monarch was a regulatory success, a bronchoscopy-specific achievement that demonstrated the technology worked. iPlatform was the multi-anatomical promise that would require entirely different regulatory pathways, many of which did not exist.

The $3.4 billion at closing bought Monarch (a cleared product), the team, and the intellectual property. The $2.35 billion in earnouts was primarily tied to iPlatform, a platform that would require regulatory pathways that had yet to be established.

Author Disclosure

Christopher Velis is the founder of Auris Surgical Robotics, Inc. (later Auris Health), which he incorporated in Delaware on September 18, 2007.[11] He served as sole director, CEO, President, Treasurer, and Secretary from incorporation through 2011. He licensed foundational technology from Columbia University and Johns Hopkins University, and recruited Frederic Moll to serve as CEO in 2011, when the two executed a Confidential Disclosure Agreement.[12]

Velis was not a shareholder of Auris Health at the time of its acquisition by Johnson & Johnson. His interest is in the accurate historical record, not financial recovery. He holds the NACD Directorship Certification (NACD.DC).

Velis manages Grey Matter Health Ventures Fund I, LLC, a special purpose vehicle through which the company's earliest investors (friends and family who invested at Auris's founding) hold former Auris Health securities. He receives no compensation for managing this SPV. Grey Matter's investors are among the stockholders represented by Fortis Advisors LLC in the pending litigation against Johnson & Johnson. This ongoing fiduciary duty to Grey Matter's investors is one source of the litigation access reflected in this paper. It also means the human stakes of the earnout outcome are not abstract: these are real people, including members of the founder's family and personal network, whose returns depend on the resolution of the earnout dispute.

Note: The Court of Chancery's opinion, based on trial testimony in which Velis did not participate, attributed founding activity to Frederic Moll, stating that "In 2009, Moll raised Auris's seed funding." The primary source documentation in Appendix A establishes a different chronology: corporate formation in September 2007, university license agreements in 2007 and 2011, SEC Form D filing in 2009, and the Moll CDA in May 2011. This paper relies on the primary source documents.

Full documentation of founding provenance is provided in Appendix A.

A Note on Sophisticated Deal Structuring

We wish to be clear: sophisticated deal structuring in one's own interest is not wrongful. Strategic acquirers are entitled, indeed expected by their shareholders, to negotiate terms that favor their interests. J&J paid $3.4 billion in cash at closing, a substantial commitment that transferred significant risk to the buyer.

The purpose of this paper is not to suggest that J&J acted improperly in structuring the deal as it did. The Delaware courts have addressed specific conduct; we address structural dynamics. Our purpose is to arm founders with the knowledge to negotiate from a position of understanding, so that the terms they accept reflect informed choices rather than information asymmetry.

We cannot know with certainty which psychological dynamics, if any, influenced specific decisions in the Auris transaction. What we can do is identify documented patterns and structural forces that affect founder outcomes generally, and let the reader draw their own conclusions.

Part I: The Case

The Company: Auris Health

Auris Health was built in the most unforgiving environment a founder can choose: surgical robotics and regulated clinical adoption. That means long development cycles, heavy capital needs, a narrow talent market, and a regulatory pathway that can change midstream.

Regulated progress is real progress. It is also tradable paper in a negotiation.

The company was founded in 2007 and developed two distinct platforms. Monarch, the bronchoscopy robot, received FDA 510(k) clearance in 2018.[13] iPlatform, the more ambitious general surgery robot, was in development at acquisition and was the subject of most earnout milestones.

The Intellectual Property Foundation

Auris's value rested not only on its robotic platforms but on a comprehensive intellectual property position assembled over more than a decade. Understanding this IP architecture is essential to understanding what J&J was actually purchasing.

The founder licensed technology from Columbia University (Professor Nabil Simaan's continuum robotics patents)[14] and Johns Hopkins University.[15] He also secured rights to IBM patents that Intuitive Surgical had licensed only "from the neck down," obtaining complementary rights for applications above the neck.

In 2016, Auris acquired Hansen Medical for approximately $80 million.[16] This acquisition was more significant than its price suggested. Hansen had previously acquired EndoVia Medical (formerly Borck Rogers Surgical), which held its own surgical robotics patents. These patents had been refined by David Lundmark, formerly of Intuitive Surgical.

Hansen had also been engaged in protracted patent litigation with Intuitive, which ended in a settlement that included an exchange of intellectual property rights. The litigation produced multiple filings in the U.S. District Court for the District of Delaware, and Hansen's SEC filings during 2012–2014 describe both the patent disputes and the terms of the eventual settlement.[17]

When Auris acquired Hansen, it consolidated:

- Hansen's own catheter robotics patents
- The EndoVia surgical robotics portfolio
- Whatever intellectual property Intuitive had exchanged in the litigation settlement
- Freedom to operate without Intuitive litigation risk

By 2019, Auris had assembled what may have been the most comprehensive non-Intuitive patent portfolio in surgical robotics. The only path into flexible surgical robotics that did not require Intuitive's permission ran through Auris.

What Was J&J Actually Buying?

This question, what the buyer is actually purchasing, is one that every founder must ask before accepting contingent consideration. The answer determines whether earnouts represent real value or optionality the buyer may never exercise.

The Strategic Context

J&J was not a passive observer of the surgical robotics landscape. They had made substantial investments:

- Verb Surgical: A joint venture with Verily (Alphabet) for digital surgery, which J&J would acquire fully in December 2019, just months after closing the Auris deal[18]
- Internal development programs for robotic surgical systems[19]
- Multiple strategic investments in robotics companies globally

J&J, like any major player entering surgical robotics, faced a fundamental challenge: Intuitive Surgical's intellectual property position. Intuitive had defended its market position aggressively through patent litigation for decades. Any competitor needed either a licensing arrangement with Intuitive or a defensive patent portfolio that could neutralize litigation risk.

The IP Fortress Hypothesis

Consider the transaction from J&J's perspective. This is a hypothesis, one of several possible explanations for the transaction structure, but one that founders should develop and test before accepting contingent consideration:

If you are building surgical robotics capability internally (Verb), and you know Intuitive will litigate aggressively against competitors, what is the strategic value of Auris?

The Monarch robot was a working bronchoscopy product, valuable but anatomically limited. The iPlatform was a development-stage general surgery robot, promising but uncleared and facing uncertain regulatory pathways.

The intellectual property portfolio, however, was irreplaceable. It represented:

- Freedom to operate in surgical robotics without Intuitive litigation
- Defensive patents that could be asserted against competitors
- The accumulated IP from a decade of strategic assembly
- The only non-Intuitive pathway into the market

Multiple motivations likely drove J&J's acquisition: the team, the products, competitive positioning, and the IP. But the relative weight of each motive matters when evaluating how earnout consideration maps to the buyer's actual priorities.

Ask yourself: If Auris's IP portfolio disappeared but Monarch remained, would J&J still pay $3.4 billion? If Monarch disappeared but the IP portfolio remained, would they still pay? The answers reveal what the buyer was actually purchasing.

The Allocation Question

The transaction structure allocated consideration as follows:

- $3.4 billion at closing: for Monarch, the team, and the intellectual property
- $2.35 billion in earnouts: primarily tied to iPlatform regulatory milestones

If the IP fortress was a primary strategic prize, then the $3.4 billion upfront may have secured the irreplaceable asset. The $2.35 billion in earnouts was structured around device milestones whose regulatory pathways J&J's team could assess independently.

This is not an accusation of improper conduct. It is an observation about strategic clarity. Sophisticated buyers understand what they are purchasing. Sophisticated sellers must understand it too, before accepting contingent consideration for assets that may not be the buyer's primary objective.

The Founder's Obligation: Develop and Test Hypotheses

Before accepting any earnout-heavy structure, founders must develop hypotheses about what the buyer actually values and test those hypotheses before closing:

- What IP does the buyer need that we have?
- What litigation risk does the buyer face that our IP resolves?
- What internal programs does the buyer have that our IP enables?
- If our products disappeared but our IP remained, would the buyer still pay this price?

- If our IP disappeared but our products remained, would the buyer still pay?

This is not speculation. It is due diligence. The failure to develop and test such hypotheses before signing is a failure of strategic discipline.

The Transaction

In February 2019, Johnson & Johnson's Ethicon subsidiary announced a definitive agreement to acquire Auris Health.[20] The structure combined substantial cash at close with contingent consideration tied to future milestones: a headline number that sounded like one price, but operated as two.

- Upfront consideration: $3.4 billion in cash at closing
- **Contingent consideration: Up to $2.35 billion in earnout payments tied to ten specific milestones**

The headline number, $5.75 billion, made this the largest acquisition of a venture-backed medical device company in history.[21] But a substantial portion of that consideration was contingent on future events that depended on regulatory pathways that each required independent regulatory programs.

Contingent consideration becomes attractive in precisely the moments founders feel strongest: when the technology works, when the buyer confirms strategic fit, and when the narrative of inevitability is at its peak. That is the conviction trap.

The Milestone Structure

The $2.35 billion in earnout consideration was carved into ten specific milestones: eight regulatory and two commercial. The regulatory milestones were primarily tied to iPlatform clearances across multiple anatomical systems.[22]

Application	Earnout Value	Regulatory Pathway
iPlatform (General Surgery)	~$400M	No predicate existed; required de novo or novel pathway
Urology	~$120M	Required urology-specific predicate (see note below)
Gynecology	~$120M	Required gynecology-specific predicate; none established for flexible robotic platform
Gastroenterology	~$120M	Required GI-specific predicate; none established for flexible robotic platform
Upper Abdominal Surgery	~$120M	Required abdominal surgery-specific predicate; none established
Lower Abdominal Surgery	~$120M	Required abdominal surgery-specific predicate; none established
Monarch Lung Ablation	$100M	Dependent on Ethicon NeuWave catheter integration
Commercial Milestones (2)	[est. included in total]	Revenue/adoption targets

Note on Urology: In May 2022, under J&J's ownership, the Monarch platform received FDA 510(k) clearance for endourological procedures (K213334). The 510(k) summary confirms this clearance used the Boston Scientific LithoVue System (K153049), a ureteroscope, as the primary predicate device. The bronchoscopy Monarch (K193534) was listed only as a reference device for the electromechanical control mechanism, not as the clinical predicate.[23] This clearance confirms the paper's core regulatory argument: a bronchoscope

predicate does not extend cross-anatomically. Each new anatomical system requires its own predicate, its own 510(k) submission, and its own clinical evidence, a separate regulatory program with separate timelines, costs, and uncertainty. The estimated earnout values above are analytical approximations; exact milestone values from the merger agreement are not public.

An earnout milestone is a target. The efforts covenant is the engine. If you do not specify the engine, you do not control the vehicle.

The Contractual Framework

The merger agreement required J&J to support milestone achievement:[24]

> *"From and after the Closing Date... Parent shall, and shall cause its Affiliates (including the Surviving Corporation) to, use commercially reasonable efforts to achieve each of the Regulatory Milestones."*

The agreement defined "commercially reasonable efforts" using an "inward-facing" standard: efforts "consistent with the usual practice of J&J with respect to priority medical device products." This compared J&J's efforts to its own internal benchmark.

Part II: The Regulatory Reality

Why the Pathway Matters More Than the Narrative

Founders talk in narratives. Regulators talk in standards. Buyers talk in risk. Earnouts turn these three languages into one document. If the document assumes the narrative, but the standard shifts, your payout becomes exposed.

The 510(k) Standard

A 510(k) submission must demonstrate that a new device is "substantially equivalent" to a legally marketed predicate device: the same intended use and either the same technological characteristics or different characteristics that do not raise new questions of safety and effectiveness.[25]

Think of the 510(k) pathway as claiming "this new drug is basically aspirin." If the FDA agrees your drug is substantially equivalent to aspirin, you're through with minimal clinical data. But if your drug treats something aspirin never treated, say cancer, you can't claim equivalence to aspirin. You need a different pathway entirely, one that requires you to prove safety and efficacy from scratch.

That's the anatomical problem with earnouts tied to multiple body systems: Monarch treats airways. The kidney is not an airway. The uterus is not an airway. The abdomen is not an airway.

The De Novo Pathway

For genuinely novel devices without a true predicate, the de novo pathway allows classification based on risk assessment rather than equivalence.[26] A successful de novo creates a new device category and establishes the novel device as the first predicate for future submissions.

The Split Predicate Problem

The FDA has explicitly disfavored "split predicates," using one device to establish intended use and a different device to establish technological characteristics. The agency's guidance states: "The use of a 'split predicate' is inconsistent with the 510(k) regulatory standard."[27]

The Anatomical Problem: Where the Predicate Dies

Monarch's 510(k) clearance was granted for a specific intended use: "bronchoscopic visualization of and access to patient airways for diagnostic and therapeutic procedures."[28] The predicate, the Karl Storz bronchoscope, is an airway device. The substantial equivalence argument had anatomical specificity. It was about lungs.

But the iPlatform earnout milestones required clearances for entirely different anatomical systems: urology, gynecology, gastroenterology, abdominal surgery.

A bronchoscope predicate gets you nowhere in the kidney.

The FDA's regulatory framework requires that predicate devices share the same intended use, and intended use is anatomically specific.[29] A device cleared for bronchoscopy cannot serve as a predicate for urological, gynecological, or abdominal procedures. Each anatomical system has different risk profiles, clinical workflows, and complication modes.

This is not a theoretical concern. When J&J pursued Monarch's expansion into urology, they filed a separate 510(k) (K213334, cleared April 29, 2022) using the Boston Scientific LithoVue ureteroscope as the primary predicate, a device already cleared for urological visualization. The bronchoscopy Monarch was referenced only for its electromechanical control technology, not as the clinical predicate.[30] The submission required separate biocompatibility testing, live porcine validation studies, human factors evaluation, and independent performance data specific to the urinary tract.

For each non-pulmonary application, iPlatform would have needed to identify a predicate that was: (a) a flexible robotic surgical platform, (b) cleared for that specific anatomical system, and (c) technologically similar enough to support substantial equivalence.

For most target anatomical systems, no such devices existed. Each new anatomical application was essentially a de novo proposition, or, as the urology clearance demonstrated, required identifying an entirely different predicate device and building a separate regulatory submission from scratch.

The milestone structure didn't represent aggressive targets. It represented regulatory pathways that each required independent programs, separate predicates, separate clinical evidence, separate FDA review cycles, with timelines and costs that compound across multiple simultaneous submissions.

Part III: The Mechanisms

The Three Machines

Every exit outcome is produced by three machines working together:

The Payout Machine determines how money flows: the waterfall of preferences, participation, earnouts, and distributions that decides who gets paid, in what order, and how much.

The Control Machine determines who can make which decisions: board composition, voting rights, protective provisions, and the post-close authority that shapes whether earnouts get achieved or abandoned.

The Employment Machine determines whether the people who built the asset have leverage after close: vesting, acceleration, retention packages, and role clarity.

Earnouts sit at the intersection of all three. They live in the payout machine as contingent consideration. They live in the control machine because the buyer controls priorities, resources, and timelines after close. They

live in the employment machine because retention and roles determine whether key builders stay to achieve the milestones.

If you do not control the post-close levers, do not price the deal as if you do.

The Founder's Conviction Trap

There is a pattern so consistent across founder-acquirer negotiations that it deserves recognition. It operates through a mechanism that can turn a founder's greatest asset, conviction, into a vulnerability.

The Setup: The Demands of Venture Fundraising

To raise venture capital, founders must project confidence about uncertain outcomes. Hedging undermines fundraising. By the time a founder sits across from a sophisticated acquirer, they may have spent years telling a particular story about what their technology can achieve.

In earnout negotiations, the acquirer's M&A team has typically reviewed every investor presentation, every board deck, every press release. They know what the founder has claimed. There is a logic to the buyer's negotiation: "If you believe so much in these outcomes, why not shift considerable consideration to the earnout?"

The Documented Psychology

The Cooper Study (1988): In a survey of 2,994 entrepreneurs, 81% believed their chances of success were at least 70%, and 33% believed their chances were 100%. The actual five-year survival rate hovers around 50%.[31]

The Planning Fallacy (Kahneman & Tversky): The systematic tendency to underestimate time, costs, and risks while overestimating benefits.[32]

The Illusion of Control (Langer, 1975): People systematically overestimate their ability to control outcomes determined by external factors.[33] But FDA clearance is not within the founder's control. Post-acquisition resource allocation is not within the founder's control.

The very qualities that enabled the company to be built, conviction, vision, persistence, may be the same qualities that prevent clear-eyed assessment of deal risk.

Board Composition and Fiduciary Risk

This section addresses a structural issue that affects virtually every venture-backed company approaching exit: the composition of the board of directors and the fiduciary risks that arise when board members' economic interests diverge from those of all shareholders.

The Typical Venture Board Structure

In late-stage venture-backed companies, board composition often follows a predictable pattern:

- Three to four seats held by investor-designated directors, representing funds with preferred stock and liquidation preferences
- One to two seats held by management, typically the CEO and sometimes the founder
- One to two "independent" directors, often recruited with input from lead investors

This structure is not unusual. But it creates dynamics that founders must understand, particularly when an acquisition includes substantial contingent consideration.

The Structural Conflict

When an acquisition combines upfront cash with earnout payments, the economic exposure of different stakeholder groups may diverge materially:

For investor-designated directors: If the upfront payment satisfies their funds' liquidation preferences, earnouts represent pure upside. If earnouts fail, their funds have already achieved target returns. Their economic exposure to earnout failure may be limited.

For common shareholders (founders, employees, early investors): The upfront payment flows to common only after preferences are satisfied. If the preference stack is substantial, common shareholders may receive relatively little at closing. The earnouts may represent the majority of their potential return.

In companies with development-stage products, where time, complexity, and regulatory factors cause delays, cumulative dividends compound. The preference stack grows. The gap between preferred and common outcomes widens.

The stakeholders whose returns depend most heavily on earnout achievement may have the least representation in evaluating the earnout structure.

The Fiduciary Framework

Directors of Delaware corporations owe fiduciary duties to all shareholders, both preferred and common.[34] The landmark case *In re Trados Inc. Shareholder Litigation* (2013) addressed precisely this issue: a board's duties when preferred and common shareholders have conflicting interests in an M&A transaction.[35]

The Court of Chancery held that directors must consider the interests of common shareholders even when, especially when, those interests diverge from preferred shareholders who may be made whole at closing. Directors who approve a transaction that benefits preferred at the expense of common, without proper process, may face liability for breach of fiduciary duty.

The Risk to Directors

We make no claims about any specific board's process or conduct. But founders, CEOs, and directors should understand the legal framework:

- Directors who approve earnout-heavy transactions without analyzing common shareholder outcomes may face litigation risk
- The business judgment rule may not protect directors who fail to consider conflicts of interest
- Process protections (special committees, independent advisors, documented deliberation) are not merely best practices; they are legal shields

What Good Governance Looks Like

For any company with substantial venture capital raised approaching an exit with significant contingent consideration, boards should consider:

- Special committee of genuinely independent directors: Directors with no economic relationship to investors whose preferences are satisfied at closing, specifically tasked with evaluating earnout structure from the common shareholder perspective
- Independent financial advisors: Advisors engaged to analyze outcomes for common shareholders, separate from advisors engaged by the company or lead investors
- Explicit deliberation: Documented board discussion of who benefits from earnout achievement, who bears the risk of earnout failure, and whether the allocation is appropriate

- Majority-of-the-minority approval: For earnout-heavy structures where interests diverge significantly, requiring approval from a majority of common shareholders

Part IV: The Aftermath

Post-Merger Integration: How Control Shifted

December 2019: The Verb Acquisition

Just months after closing the Auris acquisition, J&J announced it would acquire the remaining stake in Verb Surgical.[36] This timing raises questions: If J&J intended to integrate Auris with Verb from the outset, how does that intention square with earnout milestones premised on developing iPlatform as a standalone regulatory submission?

Project Manhattan: The Internal Bake-Off

Within weeks of closing, J&J initiated "Project Manhattan," ostensibly a "technology audit," but in practice a head-to-head competition between iPlatform and Verb.[37] The Court of Chancery found this alarmed Auris leadership, who had expected supportive integration. The court record shows that J&J knew Project Manhattan would hinder milestone achievement and "viewed the resulting delays as beneficial since it could avoid making the earnout payment."[38]

The Delaware Supreme Court affirmed the significance:

> *"Project Manhattan therefore marked the first and clearest point at which J&J's post-closing conduct diverged from its contractual promise to use 'commercially reasonable efforts' to achieve the iPlatform regulatory milestones."*

Integration Outcomes

J&J merged Auris technology with Verb, forming a unified platform eventually marketed as Ottava.[39] The Court of Chancery described the integration starkly:

> *"iPlatform effectively became a parts shop for Verb."*

The merging of the projects "diluted" iPlatform's "system, technology and team... to fix another device's problems."[40]

The Legal Aftermath

The Court of Chancery Decision (September 2024)

Vice Chancellor Lori Will issued a 145-page ruling finding that: (1) J&J breached its contractual efforts obligations; (2) J&J breached the implied covenant of good faith; and (3) J&J committed fraud by withholding information about an FDA investigation.[41]

The Fraud Finding

The fraud finding involved specific, documented conduct that illustrates the information asymmetry founders face in sophisticated acquisitions:

During deal negotiations in late 2018, J&J was running a clinical study of its NeuWave FLEX catheter, a device that was integral to the Monarch lung ablation milestone ($100M). In December 2018, a study participant died, prompting an FDA for-cause inspection. J&J's CEO, Alex Gorsky, told Auris that the relevant milestone was "so certain" that J&J viewed it as "effective 'up front' consideration." He said this while knowing about the patient death and the FDA investigation. J&J did not disclose either fact until after closing.

At trial, additional discovery conduct came to light. Gorsky's phone had been set to automatically delete text messages every 30 days. Fortis Advisors, the stockholders' representative, moved for spoliation sanctions based on the systematic destruction of evidence. Gorsky declined to testify at trial.[42]

The Court of Chancery found fraud. The Delaware Supreme Court affirmed the fraud finding.

The Delaware Supreme Court Appeal (January 2026)

Reversed: The implied covenant claim regarding the first earnout milestone. "There is no genuine contractual gap for the covenant to fill." Auris should have secured explicit protection for foreseeable regulatory changes.[43] This reversal reduced the expected award by approximately $300 million.[44]

Affirmed: Most remaining findings, including breach of efforts obligations and the fraud finding.

Remanded: For recalculation of damages consistent with the reversal.

Courts will not save you from gaps you could have anticipated. The time to protect yourself is at signing, not in court.

The Cost of Legal Remedy

Litigation Timeline

- **October 2020:** Fortis Advisors files complaint in Delaware Court of Chancery
- **December 2021:** Motion to dismiss largely denied; case proceeds to discovery
- **2022–2023:** Extended discovery period, including disputes over J&J's document production and the spoliation motion regarding Gorsky's deleted text messages
- **January 2024:** Ten-day trial; 33 witnesses (24 fact, 9 expert)
- **September 4, 2024:** Vice Chancellor Will issues 145-page Memorandum Opinion
- **October 2025:** Oral argument before Delaware Supreme Court
- **January 12, 2026:** Supreme Court issues opinion; partial reversal, partial affirmance
- **Pending:** Damages recalculation on remand

From complaint to Supreme Court ruling: five years and three months. From acquisition to Supreme Court ruling: nearly seven years. Stockholders are expected to receive approximately $600 million net of legal fees and expenses[45], 25 cents on the dollar of the $2.35 billion in contracted earnouts, after years of litigation and substantial legal costs.

Contractual protection at signing would have been faster, cheaper, and more certain.

Part V: The Lessons

Ten Principles for Structuring M&A Transactions

Principle 1: Regulatory pathway risk is structural exposure, not a negotiable term. When earnouts depend on FDA decisions, you have ceded control to a third party. If regulatory milestones represent more than 15–20% of total deal value, you are making a bet, not a sale.

Principle 2: Separate your narrative from your regulatory reality. The story that enabled fundraising may not reflect regulatory feasibility. Obtain independent regulatory assessment before negotiating.

Principle 3: Define contingencies explicitly. Do not rely on implied covenant. The Delaware Supreme Court was clear: "There is no genuine contractual gap for the covenant to fill." Draft alternate paths for key milestones.

Principle 4: Understand what the buyer is actually purchasing. Develop and test hypotheses about the buyer's strategic objectives. If IP is the prize, don't accept contingent consideration for products.

Principle 5: A clearance in one system is not a template for another. Regulatory clearances are anatomically specific. Each new system requires its own predicate, its own submission, and its own clinical evidence. Map each pathway independently before accepting earnouts.

Principle 6: Understand how acquisition changes your regulatory profile. A device that clears at a small company may face different scrutiny at a large one.

Principle 7: Examine the incentive alignment of your board. When preferred shareholders are made whole at closing, their economic interest in earnout achievement may diminish. Ensure common shareholders have voice.

Principle 8: Conduct a pre-mortem exercise. Before signing, assume the earnouts were never paid. Work backward to identify how that happened.

Principle 9: "Substantially equivalent" is a regulatory argument, not a technical fact. If your device requires creative predicate selection, that clearance may be fragile.

Principle 10: Control matters more than contract language. Post-closing, the acquirer controls everything. Structure deals to avoid needing legal remedies. In this case, legal remedy eventually yielded approximately $600 million from $2.35 billion in contracted earnouts, after nearly seven years and a ten-day trial.

Contractual Mechanisms for Founder Protection

Earnout Acceleration Clauses

If the acquirer abandons the pursuit of a milestone, the earnout accelerates and becomes immediately payable.

Regulatory Pathway Fallback Provisions

Explicitly address what happens if the anticipated pathway changes: "If the FDA requires de novo classification, Parent shall pursue such alternative pathway with the same efforts standard, and the deadline shall be extended."

One-Way Anti-Reliance Provisions

The Auris fraud claim succeeded partly because the merger agreement contained an anti-reliance provision protecting only Auris.[46] This preserves fraud remedies. Standard practice is mutual anti-reliance; one-way provisions favoring sellers preserve important protections.

Minimum Resource Commitments

Rather than relying on general "efforts" language, specify headcount, budget, and timelines for milestone-related work.

A Founder's Checklist for Evaluating Earnout-Heavy Offers

Regulatory Reality Check

- □ For each regulatory milestone, what is the specific predicate device?
- □ Does that predicate actually exist and is it cleared for the relevant indication?
- □ Have we obtained independent regulatory assessment from consultants with no relationship to the buyer?
- □ What is the de novo pathway if 510(k) fails?
- □ Have we addressed what happens if the anticipated pathway becomes unavailable?

Strategic Hypothesis Check

- □ What is the buyer actually purchasing: products, IP, team, or strategic position?
- □ If our IP disappeared but products remained, would the buyer still pay this price?
- □ If our products disappeared but IP remained, would they still pay?
- □ What internal programs does the buyer have that our assets enable?
- □ Have we tested our hypotheses about buyer motivation before signing?

Board Process Check

- □ Have we formed a special committee of genuinely independent directors?
- □ Have we engaged financial advisors specifically tasked with analyzing common shareholder outcomes?
- □ Have we conducted a pre-mortem exercise assuming earnouts fail?
- □ Is board deliberation on earnout structure documented?
- □ Do we understand the fiduciary risks if process protections are inadequate?

Economic Alignment Check

- □ What percentage of total consideration is contingent?
- □ After liquidation preferences, what do common shareholders receive at closing?
- □ What percentage of common shareholder potential returns depends on earnouts?
- □ Do the stakeholders approving the deal have economic exposure to earnout failure?

Conclusion

The Auris-J&J transaction will be studied for years as a case of sophisticated acquirer advantage over a technically brilliant but structurally disadvantaged seller.

The sellers built something genuinely unprecedented. Their technology was real. Their innovation was substantial. Their regulatory achievement with Monarch was impressive. And the intellectual property position assembled over more than a decade may have been the most comprehensive non-Intuitive patent portfolio in surgical robotics.

But the deal structure revealed disconnects: between regulatory narrative and regulatory reality, between board composition and stakeholder alignment, between what the buyer was actually purchasing and what the earnouts were structured around.

The Monarch 510(k) clearance rested on a bronchoscope predicate with anatomical specificity to the lungs. The iPlatform earnout milestones demanded clearances across entirely unrelated anatomical systems. A bronchoscope predicate provides no pathway to the kidney, the uterus, or the abdomen. When J&J later pursued Monarch's expansion into urology, the 510(k) submission confirmed this: they needed a urology-specific predicate (the LithoVue ureteroscope), not the bronchoscopy Monarch.[47] Each anatomical system was a separate regulatory program.

J&J's regulatory team would have understood this. They structured a deal where they paid $3.4 billion for the technology, the team, and the IP, then placed $2.35 billion in earnouts behind regulatory outcomes that each required independent programs with their own predicates, their own clinical evidence, and their own timelines.

This is not a story of villainy. J&J negotiated in its own interest, as it should. The enemy in this story is structural ignorance: the gap between what founders know about building companies and what they know about the machinery that determines their outcomes.

The Outcome

Of the $2.35 billion in contingent consideration, the litigation is expected to recover approximately $600 million net of legal fees and expenses[48], after more than five years of litigation, a ten-day trial, 33 witnesses, a 145-page Court of Chancery opinion, and a Delaware Supreme Court appeal. The legal system worked. It also took the better part of a decade and consumed substantial resources that could have been avoided with contractual protection at signing.

Twenty-five cents on the dollar. Nearly seven years. That is the cost of structural ignorance, and the measure of how far contractual protection at signing would have gone.

The Path Forward

Understand what you've built that's irreplaceable. If it's intellectual property, value it separately from products. Don't let buyers pay for irreplaceable assets with contingent consideration.

Understand your board's incentive alignment. If stakeholders approving the deal are protected at closing, demand process protections for those who aren't.

Understand regulatory pathways with precision. A clearance in one anatomical system is not a template for another. Map each pathway before accepting earnouts tied to it.

Remember what you built. Whatever happens with deal mechanics, the innovation was real. The technology was real. The vision of previously impossible surgeries was, and remains, worth pursuing.

The technology was Auris's gift to the field. The deal structure was the lesson they left for everyone else.

The $3.4 billion at closing may have been the real transaction. The $2.35 billion in earnouts was contingent consideration whose achievability sophisticated parties could assess, and did. The $600 million that may ultimately be recovered, after nearly seven years, a Supreme Court appeal, and substantial legal fees, is the measure of the gap between contractual protection and legal remedy.

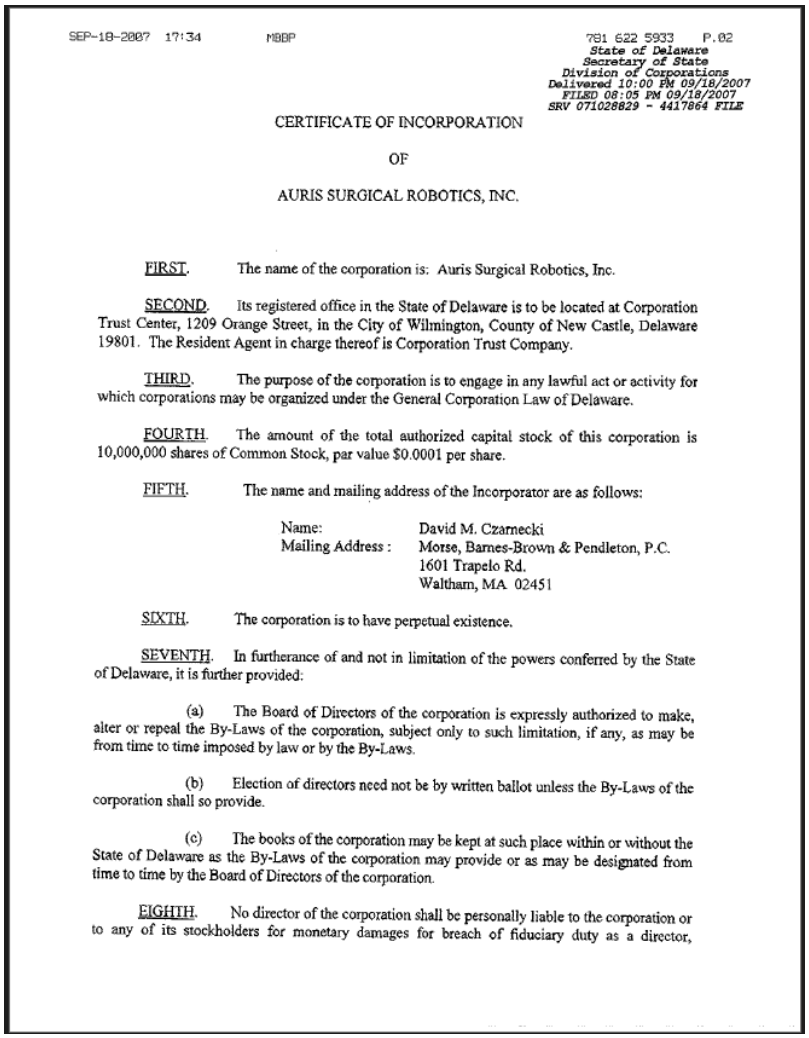
Appendix A: Founding Documentation

The following primary source documents support the founding provenance assertions in this paper. These documents are available for inspection upon request.

A.1 Corporate Formation

Certificate of Incorporation

Delaware Secretary of State, Certificate of Incorporation, Auris Surgical Robotics, Inc., File Number 4371306, filed September 18, 2007. Christopher J.P. Velis listed as sole Incorporator.



SEP-18-2007 17:34 MBBP 781 622 5933 P.02

State of Delaware
Secretary of State
Division of Corporations
Delivered 10:00 PM 09/18/2007
FILED 08:05 PM 09/18/2007
SRV 071028829 - 4417864 FILE

CERTIFICATE OF INCORPORATION

OF

AURIS SURGICAL ROBOTICS, INC.

FIRST. The name of the corporation is: Auris Surgical Robotics, Inc.

SECOND. Its registered office in the State of Delaware is to be located at Corporation Trust Center, 1209 Orange Street, in the City of Wilmington, County of New Castle, Delaware 19801. The Resident Agent in charge thereof is Corporation Trust Company.

THIRD. The purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.

FOURTH. The amount of the total authorized capital stock of this corporation is 10,000,000 shares of Common Stock, par value $0.0001 per share.

FIFTH. The name and mailing address of the Incorporator are as follows:

Name: David M. Czarnecki
Mailing Address: Morse, Barnes-Brown & Pendleton, P.C.
1601 Trapelo Rd.
Waltham, MA 02451

SIXTH. The corporation is to have perpetual existence.

SEVENTH. In furtherance of and not in limitation of the powers conferred by the State of Delaware, it is further provided:

(a) The Board of Directors of the corporation is expressly authorized to make, alter or repeal the By-Laws of the corporation, subject only to such limitation, if any, as may be from time to time imposed by law or by the By-Laws.

(b) Election of directors need not be by written ballot unless the By-Laws of the corporation shall so provide.

(c) The books of the corporation may be kept at such place within or without the State of Delaware as the By-Laws of the corporation may provide or as may be designated from time to time by the Board of Directors of the corporation.

EIGHTH. No director of the corporation shall be personally liable to the corporation or to any of its stockholders for monetary damages for breach of fiduciary duty as a director,

Certificate of Incorporation, September 18, 2007

IRS Employer Identification Number

Internal Revenue Service, Employer Identification Number Assignment, dated September 28, 2007. Document addressed to “AURIS SURGICAL ROBOTICS INC % CHRISTOPHER VELIS,” EIN: 26-1147753.

IRS DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
CINCINNATI OH 45999-0023

Date of this notice: 09-28-2007

Employer Identification Number:
26-1147753

Form: SS-4

Number of this notice: CP 575 A

AURIS SURGICAL ROBOTICS INC
% CHRISTOPHER VELIS
1050 WINTER ST STE 1000
WALTHAM, MA 02451

For assistance you may call us at:
1-800-829-4933

IF YOU WRITE, ATTACH THE
STUB AT THE END OF THIS NOTICE.

WE ASSIGNED YOU AN EMPLOYER IDENTIFICATION NUMBER

Thank you for applying for an Employer Identification Number (EIN). We assigned you EIN 26-1147753. This EIN will identify your business account, tax returns, and documents, even if you have no employees. Please keep this notice in your permanent records.

When filing tax documents, please use the label we provided. If this isn't possible, it is very important that you use your EIN and complete name and address exactly as shown above on all federal tax forms, payments, and related correspondence. Any variation may cause a delay in processing, result in incorrect information in your account, or even cause you to be assigned more than one EIN. If this information isn't correct as shown above, please correct it using the tear off stub from this notice and return it to us so we can correct your account.

Based on the information from you or your representative, you must file the following form(s) by the date(s) shown.

Form 1120 03/15/2008

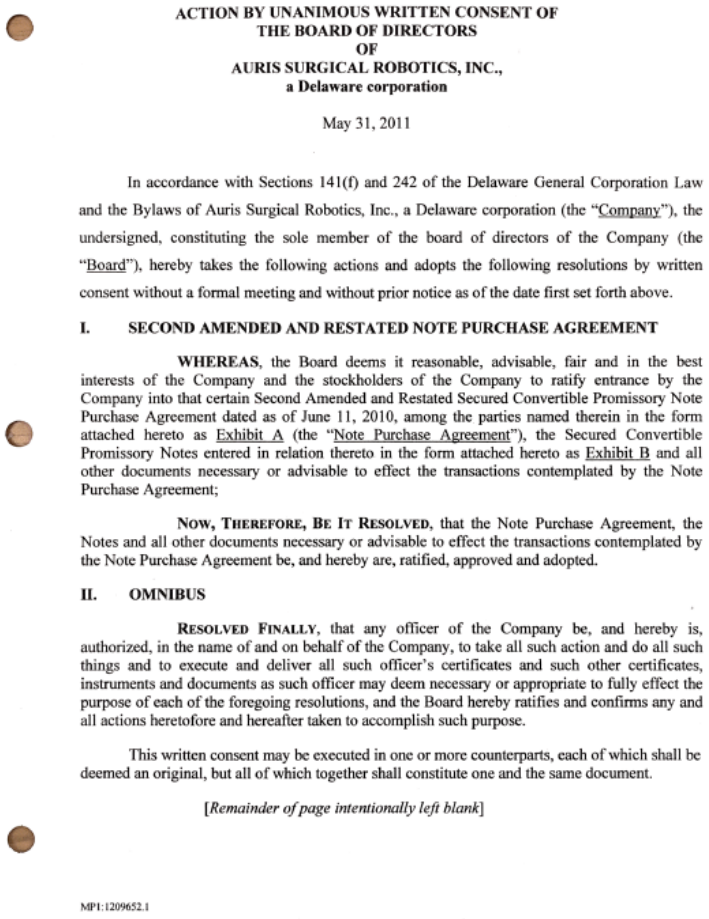
If you have questions about the form(s) or the due date(s) shown, you can call or write to us at the phone number or address at the top of this notice. If you need help in determining what your tax year is, see Publication 538, Accounting Periods and Methods, available at your local IRS office or you can download this publication from our website at www.irs.gov.

We assigned you a tax classification based on information obtained from you or your representative. It is not a legal determination of your tax classification, and is not binding on the IRS. If you want a legal determination on your tax classification, you may request a private letter ruling from the IRS under the guidelines in Revenue Procedure 2004-1,2004-1 I.R.B. 1 (or superseding Revenue Procedure for the year at issue.)

IRS EIN Assignment Letter, September 28, 2007

Consent of Incorporator

Auris Surgical Robotics, Inc. Minute Book, Consent of Incorporator dated September 18, 2007: “RESOLVED: That Christopher J.P. Velis be and he hereby is elected to serve as sole director of the Corporation.”



ACTION BY UNANIMOUS WRITTEN CONSENT OF THE BOARD OF DIRECTORS OF AURIS SURGICAL ROBOTICS, INC., a Delaware corporation

May 31, 2011

In accordance with Sections 141(f) and 242 of the Delaware General Corporation Law and the Bylaws of Auris Surgical Robotics, Inc., a Delaware corporation (the "Company"), the undersigned, constituting the sole member of the board of directors of the Company (the "Board"), hereby takes the following actions and adopts the following resolutions by written consent without a formal meeting and without prior notice as of the date first set forth above.

I. SECOND AMENDED AND RESTATED NOTE PURCHASE AGREEMENT

WHEREAS, the Board deems it reasonable, advisable, fair and in the best interests of the Company and the stockholders of the Company to ratify entrance by the Company into that certain Second Amended and Restated Secured Convertible Promissory Note Purchase Agreement dated as of June 11, 2010, among the parties named therein in the form attached hereto as Exhibit A (the "Note Purchase Agreement"), the Secured Convertible Promissory Notes entered in relation thereto in the form attached hereto as Exhibit B and all other documents necessary or advisable to effect the transactions contemplated by the Note Purchase Agreement;

NOW, THEREFORE, BE IT RESOLVED, that the Note Purchase Agreement, the Notes and all other documents necessary or advisable to effect the transactions contemplated by the Note Purchase Agreement be, and hereby are, ratified, approved and adopted.

II. OMNIBUS

RESOLVED FINALLY, that any officer of the Company be, and hereby is, authorized, in the name of and on behalf of the Company, to take all such action and do all such things and to execute and deliver all such officer's certificates and such other certificates, instruments and documents as such officer may deem necessary or appropriate to fully effect the purpose of each of the foregoing resolutions, and the Board hereby ratifies and confirms any and all actions heretofore and hereafter taken to accomplish such purpose.

This written consent may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.

[*Remainder of page intentionally left blank*]

MP1:1209652.1

Consent of Incorporator, September 18, 2007

IN WITNESS WHEREOF, the undersigned has executed this Action By Unanimous Written Consent as of the date first written above.

DIRECTOR:

Christopher J.P. Velis

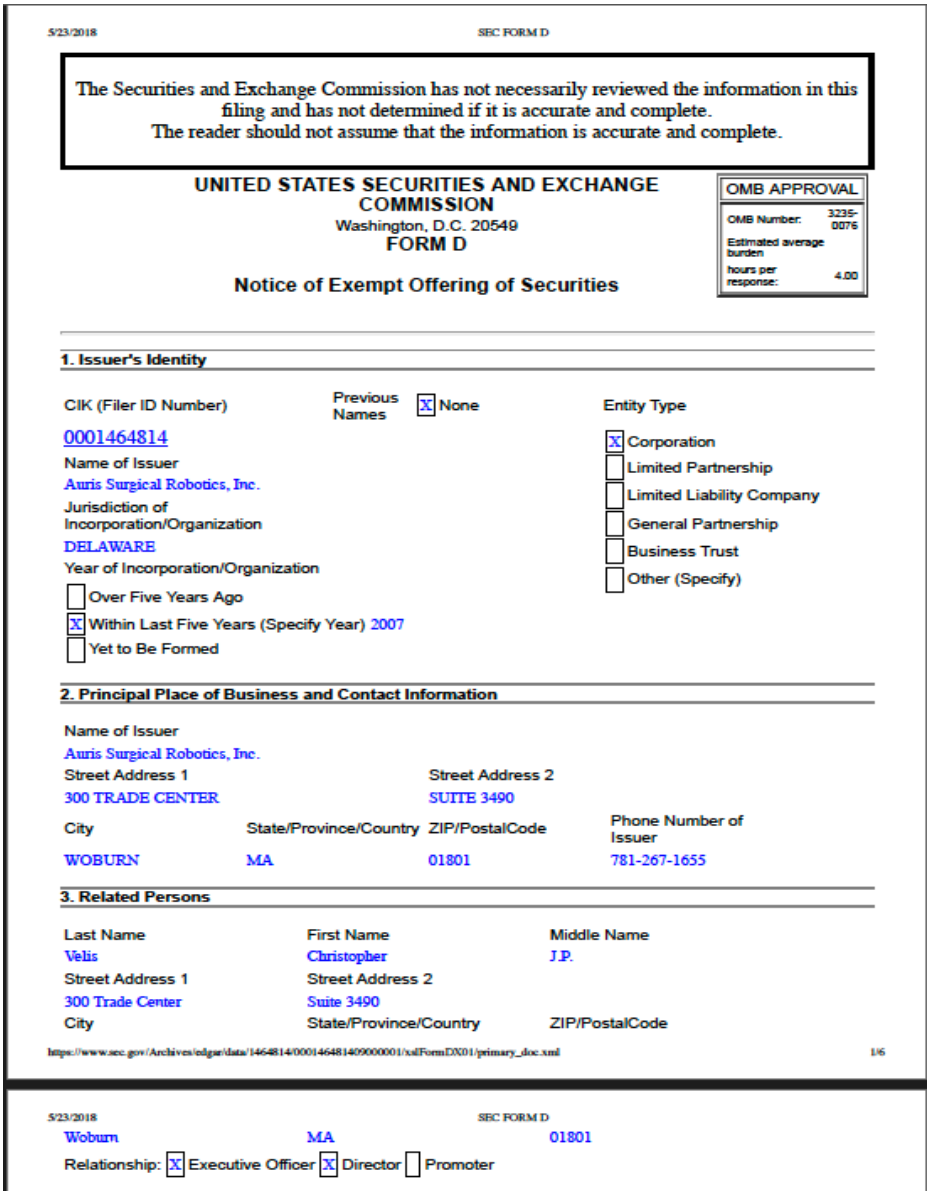
MP1:1209652.1

Consent of Incorporator, signature page

A.2 Regulatory Filings

SEC Form D

U.S. Securities and Exchange Commission, Form D, filed June 4, 2009. Christopher J.P. Velis listed as sole Executive Officer and Director with title “President.”



5/23/2018 SEC FORM D

The Securities and Exchange Commission has not necessarily reviewed the information in this filing and has not determined if it is accurate and complete.
The reader should not assume that the information is accurate and complete.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549
FORM D

Notice of Exempt Offering of Securities

OMB APPROVAL
OMB Number: 3235-0076
Estimated average burden hours per response: 4.00

1. Issuer's Identity

CIK (Filer ID Number): 0001464814
Previous Names: [X] None
Entity Type: [X] Corporation; [ ] Limited Partnership; [ ] Limited Liability Company; [ ] General Partnership; [ ] Business Trust; [ ] Other (Specify)
Name of Issuer: Auris Surgical Robotics, Inc.
Jurisdiction of Incorporation/Organization: DELAWARE
Year of Incorporation/Organization: [ ] Over Five Years Ago; [X] Within Last Five Years (Specify Year) 2007; [ ] Yet to Be Formed

2. Principal Place of Business and Contact Information

Name of Issuer: Auris Surgical Robotics, Inc.
Street Address 1: 300 TRADE CENTER
Street Address 2: SUITE 3490
City: WOBURN
State/Province/Country: MA
ZIP/PostalCode: 01801
Phone Number of Issuer: 781-267-1655

3. Related Persons

Last Name: Velis
First Name: Christopher
Middle Name: J.P.
Street Address 1: 300 Trade Center
Street Address 2: Suite 3490
City: Woburn
State/Province/Country: MA
ZIP/PostalCode: 01801
Relationship: [X] Executive Officer [X] Director [ ] Promoter

https://www.sec.gov/Archives/edgar/data/1464814/000146481409000001/xslFormDX01/primary_doc.xml 1/6

5/23/2018 SEC FORM D

SEC Form D, June 4, 2009

Provide the amount of the gross proceeds of the offering that has been or is proposed to be used for payments to any of the persons required to be named as executive officers, directors or promoters in response to Item 3 above. If the amount is unknown, provide an estimate and check the box next to the amount.

$0 USD ☐ Estimate

Clarification of Response (if Necessary):

Signature and Submission

Please verify the information you have entered and review the Terms of Submission below before signing and clicking SUBMIT below to file this notice.

Terms of Submission

In submitting this notice, each issuer named above is:

- Notifying the SEC and/or each State in which this notice is filed of the offering of securities described and undertaking to furnish them, upon written request, in the accordance with applicable law, the information furnished to offerees.*
- Irrevocably appointing each of the Secretary of the SEC and, the Securities Administrator or other legally designated officer of the State in which the issuer maintains its principal place of business and any State in which this notice is filed, as its agents for service of process, and agreeing that these persons may accept service on its behalf, of any notice, process or pleading, and further agreeing that such service may be made by registered or certified mail, in any Federal or state action, administrative proceeding, or arbitration brought against the issuer in any place subject to the jurisdiction of the United States, if the action, proceeding or arbitration (a) arises out of any activity in connection with the offering of securities that is the subject of this notice, and (b) is founded, directly or indirectly, upon the provisions of: (i) the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisers Act of 1940, or any rule or regulation under any of these statutes, or (ii) the laws of the State in which the issuer maintains its principal place of business or any State in which this notice is filed.
- Certifying that, if the issuer is claiming a Rule 505 exemption, the issuer is not disqualified from relying on Rule 505 for one of the reasons stated in Rule 505(b)(2)(iii).

Each Issuer identified above has read this notice, knows the contents to be true, and has duly caused this notice to be signed on its behalf by the undersigned duly authorized person.

For signature, type in the signer's name or other letters or characters adopted or authorized as the signer's signature.

Issuer	Signature	Name of Signer	Title	Date
Auris Surgical Robotics, Inc.	Christopher J.P. Velis	Christopher J.P. Velis	President	2009-06-04

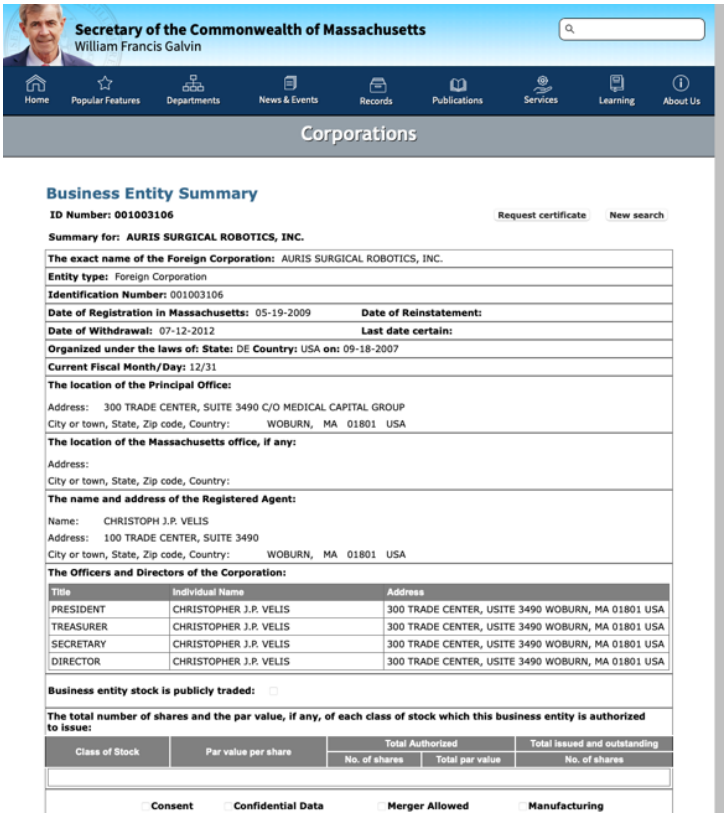
Persons who respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB number.

* This undertaking does not affect any limits Section 102(a) of the National Securities Markets Improvement Act of 1996 ("NSMIA") [Pub. L. No. 104-290, 110 Stat. 3416 (Oct. 11, 1996)] imposes on the ability of States to require information. As a result, if the securities that are the subject of this Form D are "covered securities" for purposes of NSMIA, whether in all instances or due to the nature of the offering that is the subject of this Form D, States cannot routinely require offering materials under this undertaking or otherwise and can require offering materials only to the extent NSMIA permits them to do so under NSMIA's preservation of their anti-fraud authority.

SEC Form D, continuation

Massachusetts Foreign Corporation Certificate

Massachusetts Secretary of the Commonwealth, Foreign Corporation Certificate, Auris Surgical Robotics, Inc., filed May 19, 2009.



Secretary of the Commonwealth of Massachusetts
William Francis Galvin

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Corporations

Business Entity Summary

ID Number: 001003106 Request certificate New search

Summary for: AURIS SURGICAL ROBOTICS, INC.

The exact name of the Foreign Corporation: AURIS SURGICAL ROBOTICS, INC.
Entity type: Foreign Corporation
Identification Number: 001003106
Date of Registration in Massachusetts: 05-19-2009 **Date of Reinstatement:**
Date of Withdrawal: 07-12-2012 **Last date certain:**
Organized under the laws of: State: DE **Country:** USA **on:** 09-18-2007
Current Fiscal Month/Day: 12/31
The location of the Principal Office:
Address: 300 TRADE CENTER, SUITE 3490 C/O MEDICAL CAPITAL GROUP
City or town, State, Zip code, Country: WOBURN, MA 01801 USA
The location of the Massachusetts office, if any:
Address:
City or town, State, Zip code, Country:
The name and address of the Registered Agent:
Name: CHRISTOPH J.P. VELIS
Address: 100 TRADE CENTER, SUITE 3490
City or town, State, Zip code, Country: WOBURN, MA 01801 USA
The Officers and Directors of the Corporation:

Title	Individual Name	Address
PRESIDENT	CHRISTOPHER J.P. VELIS	300 TRADE CENTER, USITE 3490 WOBURN, MA 01801 USA
TREASURER	CHRISTOPHER J.P. VELIS	300 TRADE CENTER, USITE 3490 WOBURN, MA 01801 USA
SECRETARY	CHRISTOPHER J.P. VELIS	300 TRADE CENTER, USITE 3490 WOBURN, MA 01801 USA
DIRECTOR	CHRISTOPHER J.P. VELIS	300 TRADE CENTER, USITE 3490 WOBURN, MA 01801 USA

Business entity stock is publicly traded:
The total number of shares and the par value, if any, of each class of stock which this business entity is authorized to issue:

Class of Stock	Par value per share	Total Authorized		Total issued and outstanding
		No. of shares	Total par value	No. of shares

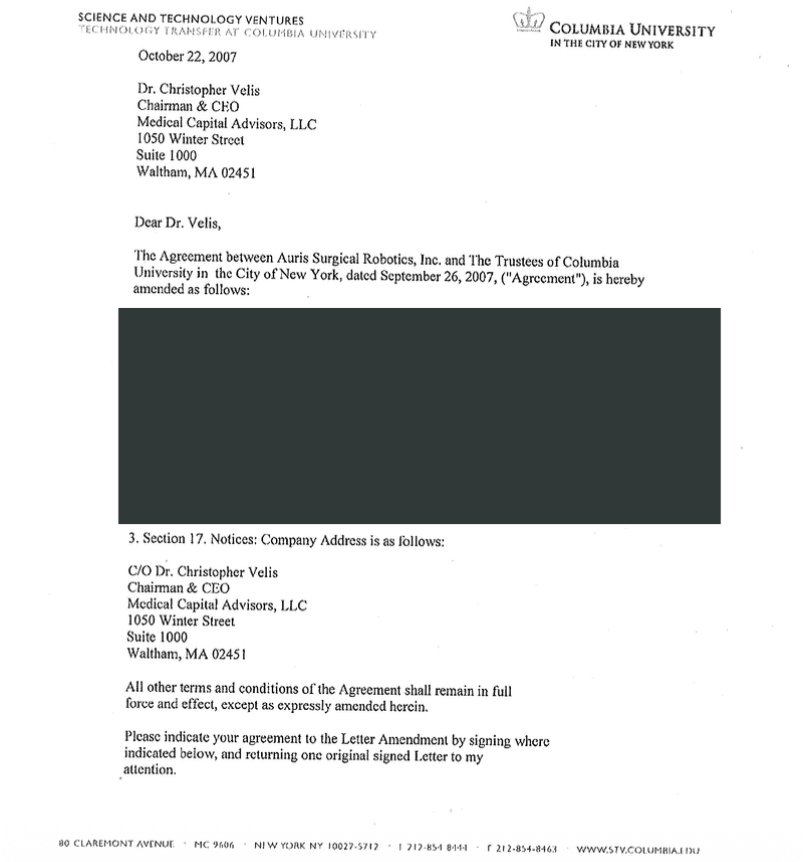
Consent Confidential Data Merger Allowed Manufacturing

Massachusetts Foreign Corporation Certificate, May 19, 2009

A.3 License Agreements

Columbia University License

License Agreement between The Trustees of Columbia University in the City of New York and Auris Surgical Robotics, Inc., dated September 26, 2007. Executed by Christopher J.P. Velis as “CEO and Chairman.”



SCIENCE AND TECHNOLOGY VENTURES
TECHNOLOGY TRANSFER AT COLUMBIA UNIVERSITY

COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK

October 22, 2007

Dr. Christopher Velis
Chairman & CEO
Medical Capital Advisors, LLC
1050 Winter Street
Suite 1000
Waltham, MA 02451

Dear Dr. Velis,

The Agreement between Auris Surgical Robotics, Inc. and The Trustees of Columbia University in the City of New York, dated September 26, 2007, ("Agreement"), is hereby amended as follows:

[redacted]

3. Section 17. Notices: Company Address is as follows:

C/O Dr. Christopher Velis
Chairman & CEO
Medical Capital Advisors, LLC
1050 Winter Street
Suite 1000
Waltham, MA 02451

All other terms and conditions of the Agreement shall remain in full force and effect, except as expressly amended herein.

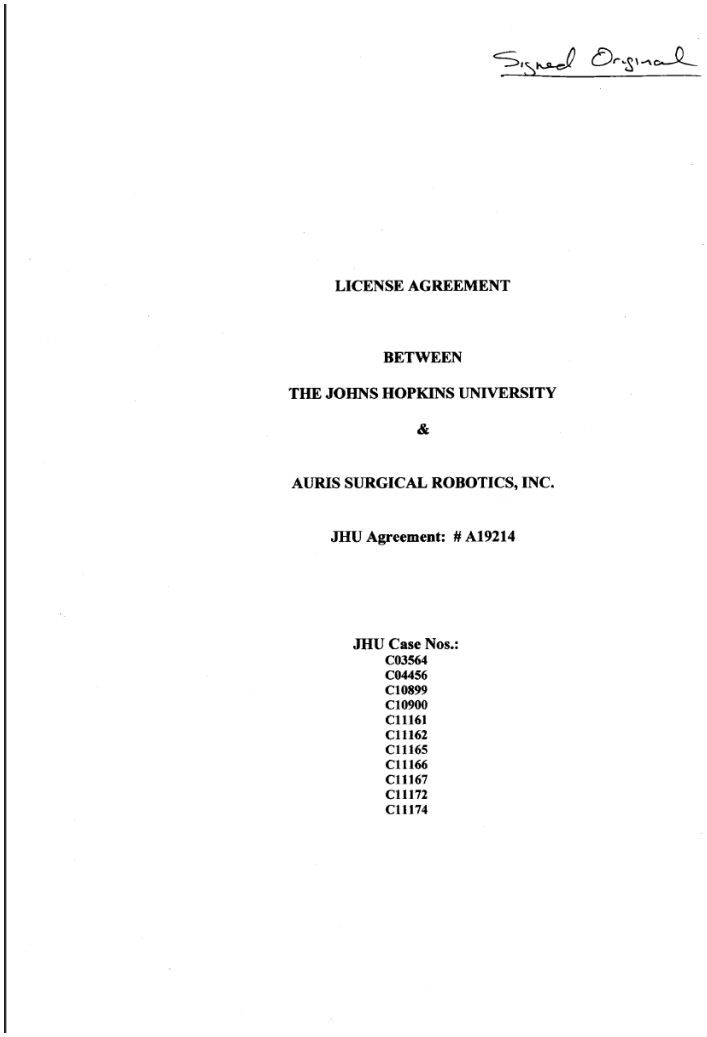
Please indicate your agreement to the Letter Amendment by signing where indicated below, and returning one original signed Letter to my attention.

80 CLAREMONT AVENUE · MC 9606 · NEW YORK NY 10027-5712 · T 212-854-8444 · F 212-854-8463 · WWW.STV.COLUMBIA.EDU

Columbia University License Agreement, September 26, 2007

Johns Hopkins University License

License Agreement between The Johns Hopkins University and Auris Surgical Robotics, Inc., dated May 26, 2011. Executed by Christopher J.P. Velis as “CEO and President.”



Signed Original

LICENSE AGREEMENT

BETWEEN

THE JOHNS HOPKINS UNIVERSITY

&

AURIS SURGICAL ROBOTICS, INC.

JHU Agreement: # A19214

JHU Case Nos.:
C03564
C04456
C10899
C10900
C11161
C11162
C11165
C11166
C11167
C11172
C11174

Johns Hopkins University License Agreement, May 26, 2011

IN WITNESS WHEREOF, this Agreement shall take effect as of the EFFECTIVE DATE when it has been executed below by the duly authorized representatives of the parties.

THE JOHNS HOPKINS UNIVERSITY	**AURIS SURGICAL ROBOTICS, INC**
Wesley D. Blakeslee, J.D., CLP Executive Director Johns Hopkins Technology Transfer	Christopher J.P. Velis Title: CEO and President
6/8/2011 (Date)	May 26 2011 (Date)

EXHIBIT A. LICENSE FEE, ROYALTIES, and EXTENSTION FEES.
EXHIBIT B. INVENTIONS DEVELOPED AT JHU.
EXHIBIT C. PATENT RIGHTS.
EXHIBIT D. QUARTERLY SALES & ROYALTY REPORT FORM.
EXHIBIT E. PAST PATENT EXPENSES.

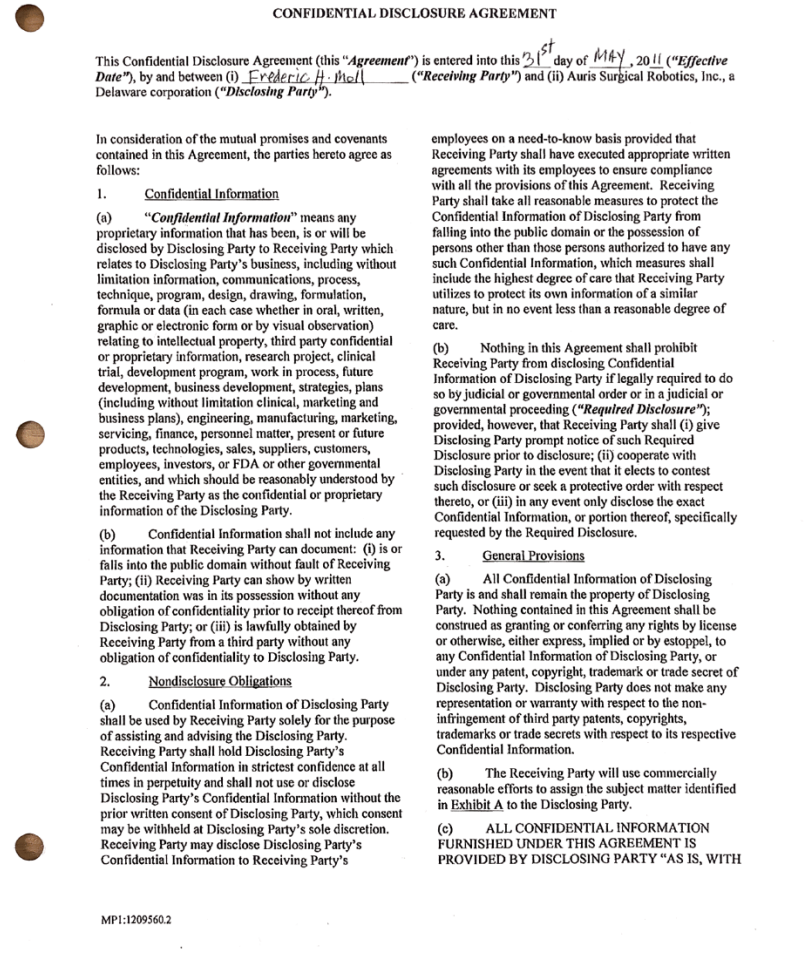
TLJ/ EFY/ADG-JHU Agrmt. #: A19214 **Page 16** 5/25/2011

Johns Hopkins University License Agreement, signature page

A.4 Moll Engagement

Confidential Disclosure Agreement

Confidential Disclosure Agreement between Auris Surgical Robotics, Inc. (“Disclosing Party”) and Frederic H. Moll (“Receiving Party”), dated May 31, 2011. Chris Velis signed as “CEO” for Auris. Moll signed as “Receiving Party.” This document establishes that Moll was brought into Auris as an outside party four years after the company’s founding.



CONFIDENTIAL DISCLOSURE AGREEMENT

This Confidential Disclosure Agreement (this "***Agreement***") is entered into this 31st day of MAY, 2011 ("***Effective Date***"), by and between (i) Frederic H. Moll ("***Receiving Party***") and (ii) Auris Surgical Robotics, Inc., a Delaware corporation ("***Disclosing Party***").

In consideration of the mutual promises and covenants contained in this Agreement, the parties hereto agree as follows:

1. Confidential Information

(a) "***Confidential Information***" means any proprietary information that has been, is or will be disclosed by Disclosing Party to Receiving Party which relates to Disclosing Party's business, including without limitation information, communications, process, technique, program, design, drawing, formulation, formula or data (in each case whether in oral, written, graphic or electronic form or by visual observation) relating to intellectual property, third party confidential or proprietary information, research project, clinical trial, development program, work in process, future development, business development, strategies, plans (including without limitation clinical, marketing and business plans), engineering, manufacturing, marketing, servicing, finance, personnel matter, present or future products, technologies, sales, suppliers, customers, employees, investors, or FDA or other governmental entities, and which should be reasonably understood by the Receiving Party as the confidential or proprietary information of the Disclosing Party.

(b) Confidential Information shall not include any information that Receiving Party can document: (i) is or falls into the public domain without fault of Receiving Party; (ii) Receiving Party can show by written documentation was in its possession without any obligation of confidentiality prior to receipt thereof from Disclosing Party; or (iii) is lawfully obtained by Receiving Party from a third party without any obligation of confidentiality to Disclosing Party.

2. Nondisclosure Obligations

(a) Confidential Information of Disclosing Party shall be used by Receiving Party solely for the purpose of assisting and advising the Disclosing Party. Receiving Party shall hold Disclosing Party's Confidential Information in strictest confidence at all times in perpetuity and shall not use or disclose Disclosing Party's Confidential Information without the prior written consent of Disclosing Party, which consent may be withheld at Disclosing Party's sole discretion. Receiving Party may disclose Disclosing Party's Confidential Information to Receiving Party's employees on a need-to-know basis provided that Receiving Party shall have executed appropriate written agreements with its employees to ensure compliance with all the provisions of this Agreement. Receiving Party shall take all reasonable measures to protect the Confidential Information of Disclosing Party from falling into the public domain or the possession of persons other than those persons authorized to have any such Confidential Information, which measures shall include the highest degree of care that Receiving Party utilizes to protect its own information of a similar nature, but in no event less than a reasonable degree of care.

(b) Nothing in this Agreement shall prohibit Receiving Party from disclosing Confidential Information of Disclosing Party if legally required to do so by judicial or governmental order or in a judicial or governmental proceeding (***"Required Disclosure"***); provided, however, that Receiving Party shall (i) give Disclosing Party prompt notice of such Required Disclosure prior to disclosure; (ii) cooperate with Disclosing Party in the event that it elects to contest such disclosure or seek a protective order with respect thereto, or (iii) in any event only disclose the exact Confidential Information, or portion thereof, specifically requested by the Required Disclosure.

3. General Provisions

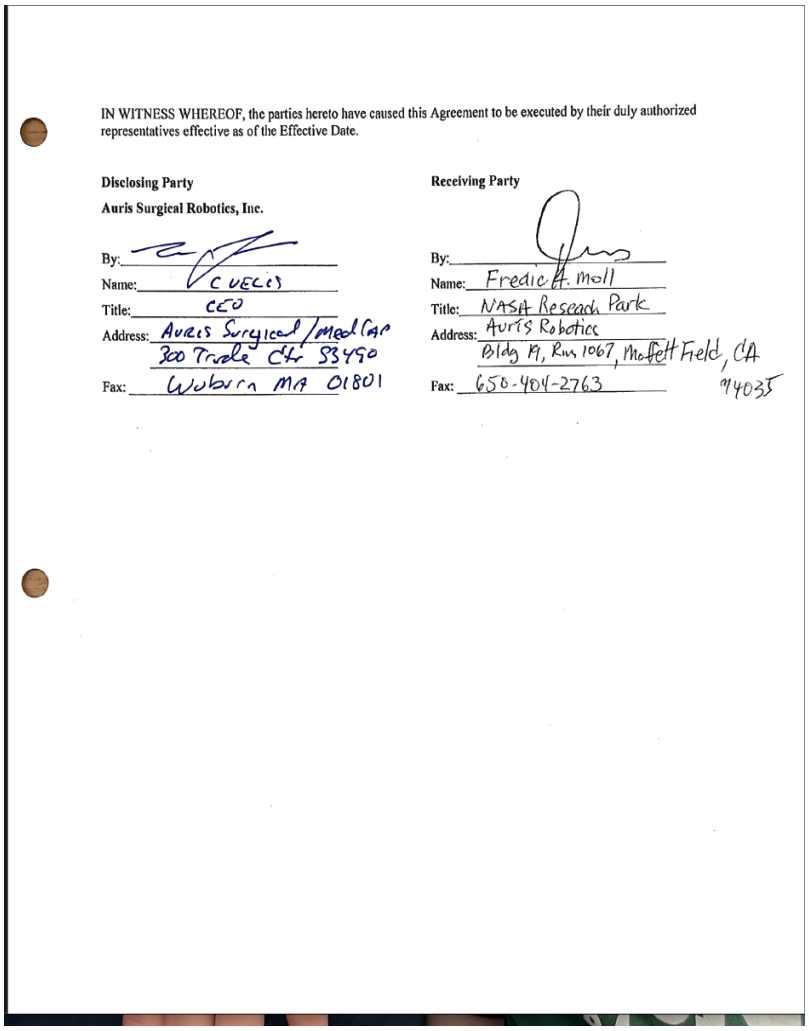
(a) All Confidential Information of Disclosing Party is and shall remain the property of Disclosing Party. Nothing contained in this Agreement shall be construed as granting or conferring any rights by license or otherwise, either express, implied or by estoppel, to any Confidential Information of Disclosing Party, or under any patent, copyright, trademark or trade secret of Disclosing Party. Disclosing Party does not make any representation or warranty with respect to the non-infringement of third party patents, copyrights, trademarks or trade secrets with respect to its respective Confidential Information.

(b) The Receiving Party will use commercially reasonable efforts to assign the subject matter identified in Exhibit A to the Disclosing Party.

(c) ALL CONFIDENTIAL INFORMATION FURNISHED UNDER THIS AGREEMENT IS PROVIDED BY DISCLOSING PARTY "AS IS, WITH

MP1:1209560.2

Moll Confidential Disclosure Agreement, May 31, 2011



IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives effective as of the Effective Date.

Disclosing Party

Auris Surgical Robotics, Inc.

By: _____

Name: C UECIS

Title: CEO

Address: Auris Surgical / MedCAP
300 Trade Ctr Ste 5345O
Wubrn MA 01801

Fax: _____

Receiving Party

By: _____

Name: Fredic A. Moll

Title: NASA Research Park

Address: Auris Robotics
Bldg 19, Rm 1067, Moffett Field, CA
94035

Fax: 650-404-2763

Moll CDA, signature page

Appendix B: Litigation Timeline

The following timeline is compiled from publicly available court filings and correspondence from Fortis Advisors LLC, the stockholders' representative in Fortis Advisors LLC v. Johnson & Johnson et al., C.A. No. 2020-0881-LWW.

2019

- **February 13:** Johnson & Johnson announces definitive agreement to acquire Auris Health for $3.4 billion plus up to $2.35 billion in earnout payments.
- **April:** Acquisition closes. J&J initiates Project Manhattan within weeks.
- **December:** J&J announces acquisition of remaining Verb Surgical stake.

2020

- **October:** Fortis Advisors LLC files complaint in Delaware Court of Chancery, alleging breach of contract and fraud regarding earnout milestones.

2021

- **December:** Court of Chancery largely denies J&J's motion to dismiss, allowing claims to proceed to discovery.

2022

- **May 2:** FDA clears Monarch Platform for endourological procedures (K213334), using a urology-specific predicate, confirming that cross-anatomical expansion requires independent regulatory programs.
- **2022–2023:** Extended discovery period, including disputes over J&J's document production. Fortis Advisors moves for spoliation sanctions based on J&J CEO Alex Gorsky's phone auto-deleting text messages every 30 days.

2024

- **January:** Ten-day trial before Vice Chancellor Lori Will. 33 witnesses: 24 fact witnesses, 9 expert witnesses. Gorsky declines to testify.
- **February 8:** Gorsky formally declines to appear as a trial witness.
- **September 4:** Vice Chancellor Will issues 145-page Memorandum Opinion finding breach of contract, breach of implied covenant, and fraud. Awards damages exceeding $1 billion.

2025

- **October:** Oral argument before the Delaware Supreme Court.

2026

- **January 12:** Delaware Supreme Court issues opinion. Reverses implied covenant claim regarding first milestone (reducing award by approximately $300 million). Affirms breach of efforts obligations and fraud finding. Remands for damages recalculation.
- **Pending:** Damages recalculation on remand. Expected net proceeds to stockholders: approximately $600 million after legal fees and expenses.

Disclaimer

This white paper is provided for educational purposes only and does not constitute legal, financial, or investment advice. The analysis presented is based on publicly available information and the authors' interpretation of events. Founders, directors, and executives should consult qualified legal and financial advisors before making decisions about M&A transactions, governance structures, or contractual terms.

The psychological and behavioral frameworks presented describe documented patterns in academic literature. We make no claims about which dynamics operated in the specific transaction discussed. The discussion of board composition and fiduciary risk describes general legal frameworks and structural dynamics; we make no claims about the conduct or process of any specific board.

Sophisticated deal structuring in one's own interest is not wrongful. The purpose of this paper is to help founders negotiate from understanding, not to suggest improper conduct by any party.

About AEIOU Academy

Why This Exists

Every other high-stakes profession has systematized its operational excellence.

Surgeons have protocols. Before an incision is made, there is a checklist. Preventable deaths have dropped by orders of magnitude.

Pilots have checklists. Before every takeoff, there is a run-up procedure. Flying has become the safest form of transportation on earth.

Special operators have SOPs. After-action reviews examine every mission.

Entrepreneurship remains the last holdout.

Founders learn through trial and error, mostly error. The knowledge that would prevent catastrophic mistakes exists, but it's scattered across expensive professionals, hard-won experience, and lessons learned too late.

Our Approach

AEIOU Academy provides the operating system for entrepreneurship: the systematized knowledge, frameworks, and practices that transform preventable failure into manageable risk.

We distinguish between two types of risk:

Elephant Risk: The inherent product and market risk that defines entrepreneurship. Will customers want this? Can we build it? This risk cannot be systematized away; it's why entrepreneurship exists.

Structural Risk: The structural, operational, and governance risk that has nothing to do with whether the product works. This risk can and should be engineered away through proper structure, knowledge, and practice.

AEIOU exists to eliminate Structural Risk, so that founder outcomes are determined by whether they built something valuable, not by whether they understood the fine print.

About the Authors

Christopher Velis, NACD.DC

Co-Founder, AEIOU Academy | Founder, Auris Health

Christopher Velis brings a perspective that few possess: the view from every seat at the table. As the founder of Auris Health, he built the company from concept through early development before recruiting operational leadership to scale it. As an investment banker, he advised on over $10 billion in M&A transactions. As a venture capitalist, he evaluated hundreds of companies. Chris holds the NACD Directorship Certification (NACD.DC) and is pursuing a Doctor of Business Administration at Babson College, where his research focuses on founder outcomes.

Dr. Christos Kelepouris

Co-Founder, AEIOU Academy

Christos Kelepouris is a Fulbright Specialist and UAE-Stanford Innovation Fellow who has trained entrepreneurs across three continents. His research focuses on the structural knowledge gaps that determine founder outcomes.

AEIOU Academy

www.aeiouacademy.org

Notes

[1] Johnson & Johnson v. Fortis Advisors LLC, No. 490, 2024, 2026 WL 89452 (Del. Jan. 12, 2026).

[2] Fortis Advisors LLC, Correspondence to Former Auris Health Securityholders, January 20, 2026 (reporting expected net proceeds of approximately $600 million after legal fees and expenses, and the approximately $300 million reduction from the Supreme Court's reversal of the first milestone claim).

[3] FDA 510(k) Premarket Notification K213334, Monarch Platform, Urology, cleared April 29, 2022. 510(k) Summary identifies primary predicate device as LithoVue System (K153049), a ureteroscope manufactured by Boston Scientific; and reference device as Monarch Platform bronchoscopy (K193534) for electromechanical control mechanism only.

[4] Johnson & Johnson Press Release, "Johnson & Johnson Announces Definitive Agreement to Acquire Auris Health, Inc.," February 13, 2019.

[5] Merger Agreement between Johnson & Johnson, Ethicon Endo-Surgery, Inc., and Auris Health, Inc., February 2019, Schedule of Regulatory Milestones.

[6] Fortis Advisors LLC v. Johnson & Johnson et al., C.A. No. 2020-0881-LWW, Delaware Court of Chancery, Memorandum Opinion, September 4, 2024 (Vice Chancellor Lori Will).

[7] Johnson & Johnson v. Fortis Advisors LLC, No. 490, 2024, 2026 WL 89452 (Del. Jan. 12, 2026).

[8] Fortis Advisors LLC, Correspondence to Former Auris Health Securityholders, January 20, 2026.

[9] FDA 510(k) Clearance K173760, Monarch Platform, cleared February 2018.

[10] Merger Agreement, J&J/Auris, February 2019, Schedule of Regulatory Milestones (iPlatform milestones constituted the majority of earnout consideration).

[11] Delaware Secretary of State, Certificate of Incorporation, Auris Surgical Robotics, Inc., File Number 4371306, filed September 18, 2007.

[12] Confidential Disclosure Agreement between Auris Surgical Robotics, Inc. and Frederic H. Moll, dated May 31, 2011.

[13] FDA 510(k) Clearance K173760.

[14] License Agreement, Columbia University and Auris Surgical Robotics, September 26, 2007.

[15] License Agreement, Johns Hopkins University and Auris Surgical Robotics, May 26, 2011.

[16] Auris Surgical Robotics Press Release, "Auris Surgical Robotics Acquires Hansen Medical," July 27, 2016.

[17] Hansen Medical, Inc. SEC filings (10-K, 10-Q, 2012–2014), describing patent litigation with Intuitive Surgical, Inc. and the terms of the eventual settlement, including an exchange of intellectual property rights.

[18] Johnson & Johnson Press Release, "Johnson & Johnson to Acquire Verily's Stake in Verb Surgical," December 2019.

[19] Johnson & Johnson Medical Devices product disclosures.

[20] Johnson & Johnson Press Release, February 13, 2019.

[21] PitchBook Data, Inc., "Largest venture-backed medtech acquisitions," 2019.

[22] Fortis Advisors LLC v. Johnson & Johnson, Delaware Court of Chancery, September 4, 2024 (describing ten milestones).

[23] FDA 510(k) Premarket Notification K213334, Monarch Platform, Urology, cleared April 29, 2022. Primary predicate: LithoVue System (K153049); reference device: Monarch Platform bronchoscopy (K193534) for electromechanical control mechanism only.

[24] Merger Agreement § 2.07(e)(i), J&J/Auris, February 2019.

[25] 21 U.S.C. § 360c(i); 21 C.F.R. § 807.100(b); FDA Guidance Document, "The 510(k) Program."

[26] FDA De Novo Classification Process, 21 U.S.C. § 360c(f)(2).

[27] FDA Guidance Document, "The 510(k) Program," Section IV.D.

[28] FDA 510(k) Clearance K173760.

[29] FDA Guidance Document, "The 510(k) Program," Section III.

[30] FDA 510(k) Premarket Notification K213334, Monarch Platform, Urology, cleared April 29, 2022.

[31] Cooper, A.C., Woo, C.Y., & Dunkelberg, W.C. (1988). Entrepreneurs' perceived chances for success. Journal of Business Venturing, 3(2), 97–108.

[32] Kahneman, D. & Tversky, A. (1979). Intuitive prediction: Biases and corrective procedures; Kahneman, D. (2011). Thinking, Fast and Slow.

[33] Langer, E.J. (1975). The illusion of control. Journal of Personality and Social Psychology, 32(2), 311–328.

[34] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

[35] In re Trados Inc. S'holder Litig., 73 A.3d 17 (Del. Ch. 2013).

[36] Johnson & Johnson Press Release, December 2019.

[37] Fortis Advisors LLC v. Johnson & Johnson, Delaware Court of Chancery, September 4, 2024.

[38] Id.

[39] Johnson & Johnson Medical Devices, Ottava platform announcements.

[40] Fortis Advisors LLC v. Johnson & Johnson, Delaware Court of Chancery, September 4, 2024.

[41] Id.

[42] Fortis Advisors LLC, Correspondence to Former Auris Health Securityholders, November 22, 2022 (describing spoliation motion regarding deleted text messages) and February 8, 2024 (noting Gorsky's decision not to testify at trial).

[43] Johnson & Johnson v. Fortis Advisors, Delaware Supreme Court, January 12, 2026.

[44] Fortis Advisors LLC, Correspondence to Former Auris Health Securityholders, January 20, 2026.

[45] Fortis Advisors LLC, Correspondence to Former Auris Health Securityholders, January 20, 2026.

[46] Fried Frank Harris Shriver & Jacobson LLP, "Critical New Drafting Guidance from Delaware Supreme Court on Earnouts," January 2026.

[47] FDA 510(k) Premarket Notification K213334, Monarch Platform, Urology, cleared April 29, 2022.

[48] Fortis Advisors LLC, Correspondence to Former Auris Health Securityholders, January 20, 2026.