

Market Trends 2021/22: Earn-Outs in Public-Private Deals

A Practical Guidance® Practice note by
Section on Recent Earn-Out Litigation Developments by Linda Igarashi and
Eugene Choi, Sheppard, Mullin, Richter & Hampton LLP



Linda Igarashi
Sheppard, Mullin, Richter & Hampton LLP



Eugene Choi
Sheppard, Mullin, Richter & Hampton LLP

This practice note discusses market trends in earn-outs in deals involving publicly held acquirers and privately held targets during 2021 and the first half of 2022. The discussion covers an overview of earn-outs, key metrics related to earn-outs, earn-out acceleration triggers, and other aspects of earn-outs, and includes a list of representative deals with links to the deal summaries in Market Standards.

The data analyzed in this practice note was obtained using Market Standards, which contains over 38,000 publicly filed M&A deals from 2008 to the present. A total of 150+ data points are searchable for deals from 2017 to present, for public target deals initially valued at \$100+ million and private target deals initially valued at \$25+ million. There are 80+ searchable deal points for transaction with first filings prior to 2017. For more information on Market Standards M&A, click [here](#).

An earn-out is a contingent portion of the purchase price payable from the buyer to the seller after the closing of

the deal. There is significant flexibility in how to structure an earn-out. For example, after closing, the earn-out can last anywhere between six months to five years or more. Payments to the seller can occur in regular intervals or in a lump sum at the end of the earn-out period. The metrics used to measure the earn-out can be the target's achievement of any financial or nonfinancial metric upon which the parties agree.

A fundamental benefit of an earn-out provision is that it provides a bridge for parties that disagree on the value of a target company. Without the earn-out, optimistic sellers might insist upon a larger valuation of the target company, citing future prospects, future growth, or anticipated regulatory approvals that will increase the value of the company. In contrast, cautious buyers might insist upon a smaller valuation of the target company, citing limited historical financial data, a limited customer base, and little to no record of successful regulatory approvals. With such opposing views, earn-outs bridge the gap by providing a middle ground that allows the deal to proceed.

A buyer may want an earn-out for several reasons. For instance, an earn-out provision can make a buyer's offer more competitive when a target company has multiple potential purchasers. An earn-out also allows a buyer to pay less for the target up front. Instead, the buyer promises to pay the earn-out only if the target achieves its future earn-out milestones. If the target company fails to achieve those milestones, then the seller forfeits the earn-out payment and the buyer ultimately benefits by paying a reduced purchase price for the target business.

A seller may want an earn-out for several reasons as well. For instance, an earn-out may allow a seller to attract a

hesitant buyer that otherwise disagrees with the seller's valuation of the target, especially if the seller is confident that the earn-out will be achieved. It may also result in obtaining a higher aggregate value for the sale of the business—particularly during an economic downturn when buyers are wary of overpaying. Finally, if a seller is already receiving a significant portion of the purchase price up front, a contingent payment can also become pure “upside” for the seller.

Earn-outs are uniquely valuable tools for deals involving target companies with significant growth prospects that are difficult to value in the present. Examples of such companies may include start-up companies, companies with limited operating history, or life sciences companies where regulatory approval or denial of the company's products will significantly impact the value of the company. Earn-outs may also serve as an incentive to management stockholders held over from the sellers to achieve post-closing results for the buyer.

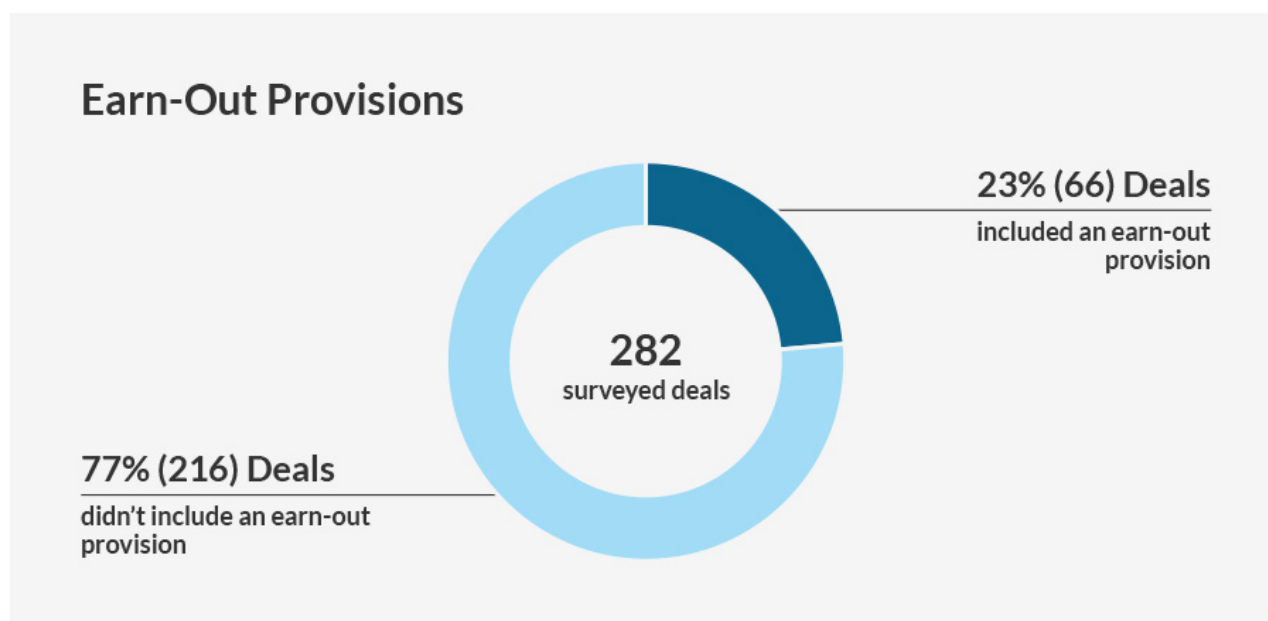
For more information on earn-outs, including drafting pro-buyer and pro-seller provisions, establishing earn-out targets, and discussing post-closing operation of the target business, see [Earn-Out Clauses](#). See also [Consideration in an M&A Deal – Earn-Outs](#). For annotated earn-out clause templates, see:

- [Earn-Out Clause](#)
- [Life Sciences Milestone Based Earn-Out Clause \(EU\)](#)
- [Life Sciences Net Sales Based Earn-Out Clause](#)
- [Life Sciences Sales / Net Revenue Based Earn-Out Clause](#)

The following analysis is based on 282 private target deals announced between January 1, 2021, and June 30, 2022, with deal values in excess of \$100 million. Deal values reflect figures as reported by the parties in their public filings, and percentages are calculated from those figures. The manner in which deal values are calculated may vary from transaction to transaction.

Earn-Outs Overview

Of 282 deals surveyed, 66 (23%) included an earn-out provision.



Source: Market Standards

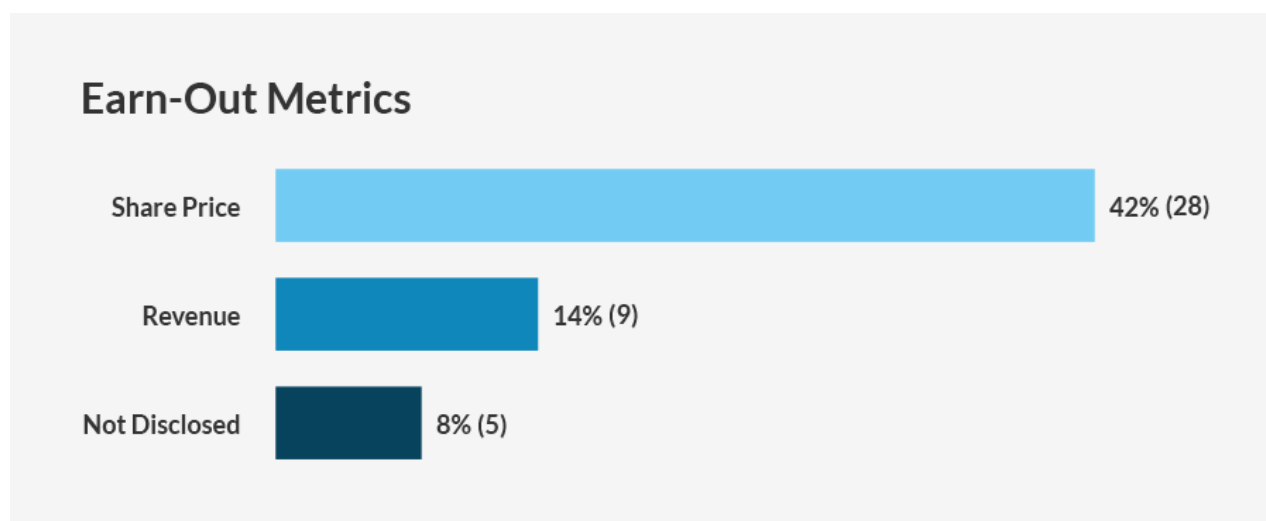
Earn-Out Metrics

An earn-out metric is the criterion or criteria by which the target company's performance is measured during the earn-out period. These metrics vary by deal and are largely dictated by the nature of the target's business. For many target companies, the earn-out metrics will be a financial milestone, such as a share price, gross profits milestone revenue, or

EBITDA. In some industries, nonfinancial metrics (referred to below as milestones) might be a more appropriate way of valuing a company. For instance, in the pharmaceutical industry, a nonfinancial milestone might be the approval for a new drug application, a Phase III clinical trial, or commercial approval of a medication by the Food and Drug Administration. In manufacturing, a nonfinancial milestone could be the successful increase of the annual manufacturing capacity to a certain amount. Other nonfinancial milestones might include obtaining a certain number of new customers or subscribers, selling a certain number of products, or launching a new product into a new market or territory. Depending on the circumstances of the target business, it may be appropriate for more than one performance measure to be used.

In addition to including earn-out metrics, many deals also include sample, hypothetical earn-out calculations to explain how the earn-out would be paid out in a given scenario. Samples such as these, which may be embedded into the governing agreement or included as an attachment, minimize misunderstanding related to the earn-out language and reduce the threat of future litigation. In addition, if litigation were to occur, sample calculations are also useful for assisting the court in ascertaining the parties' intentions with respect to how the earn-out should be paid.

For the 66 deals that included an earn-out metric, the most common metric was share price, which was present in 28 deals (42%), including deals with an additional metric, such as EBITDA or a milestone event. Nine deals (14%) used revenue as the earn-out metric. Five deals (8%) contained a metric not publicly disclosed, listed below as "Not Disclosed."



Source: Market Standards

Acceleration of Earn-Out Payments

Of the 66 identified deals containing an earn-out, 27 deals (41%) contained an earn-out acceleration provision, to the benefit of sellers. An earn-out acceleration provision provides that the buyer must pay the seller the entire earn-out, or an agreed-upon portion, immediately upon the occurrence of certain events, such as a change of control or other significant corporate event. Sellers usually justify acceleration triggers by arguing that the triggering event will so significantly change the business or otherwise make it impractical or impossible for the earn-out to be achieved that the acceleration event should be included to prevent such actions from being taken. Of the 27 deals identified with an earn-out acceleration provision, 23 contained a change of control trigger. Two acceleration provisions would also be triggered by the termination of certain key employees. In such events, either half of the earn-out or more would be immediately due to the seller.

Acceleration of Earn-Out Payments



Source: Market Standards

Buy-Out Option

In some deals, the buyer may want the option to pay sellers a specified amount in exchange for the right to terminate its remaining earn-out obligations. Buy-out options are beneficial to buyers as a way of avoiding future disputes related to the earn-out and providing flexibility to the buyer. In exercising a buy-out option, the buyer “buys out” the earn-out and, once done, may be able to negotiate release from future earn-out payments and some or all of the earn-out covenants, which might be restricting the buyer’s ability to resell the target company or change management personnel. Buy-out options continue to be rare, however. Of the deals surveyed in this study, none contained a buy-out option.

Earn-Outs in De-SPAC Deals

The use of earn-outs in business combinations involving a special purpose acquisition company (SPAC), commonly referred to as de-SPAC transactions, remained steady over the past year and a half. A de-SPAC transaction involves the use of a SPAC, a public shell company, to raise funds through an initial public offering (IPO) followed by use of the IPO proceeds to acquire a private company. In a de-SPAC deal, an earn-out generally refers to the right of the target company shareholders to receive additional consideration if certain milestones are met, usually based on the combined company’s post-closing public share price. Of the 66 identified deals identified in this analysis containing an earn-out, 38 deals (58%) involved a de-SPAC transaction.

Earn-Outs in De-SPACs Deals

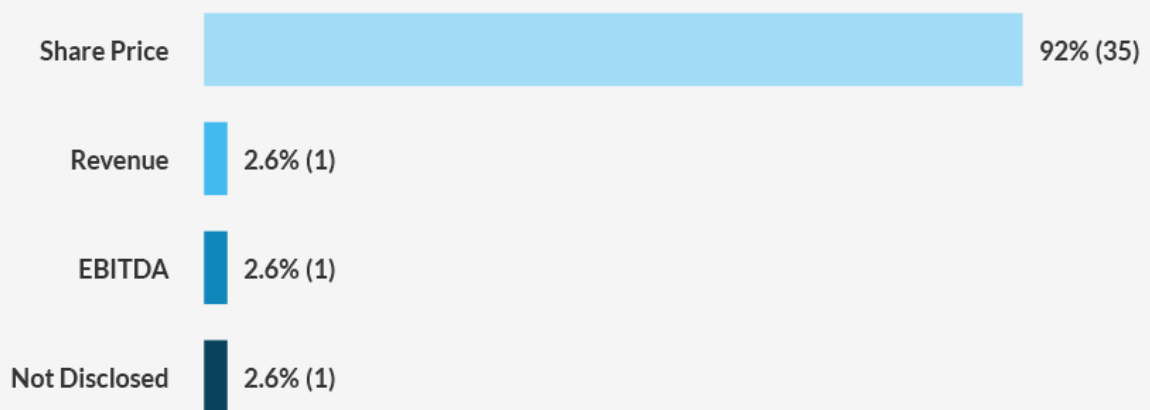


Source: Market Standards

Of the 38 de-SPAC transactions with earn-outs, 35 deals (92%) included a share price metric, with a certain amount of shares being issued as additional consideration when the target company share price reaches a specific threshold, or at various share price thresholds through a tranche structure. For example, in the Ginkgo Bioworks, Inc. de-SPAC deal, the target shareholders were entitled to receive 188.7 million shares divided into four equal tranches if the trading price per share of the merged company common stock was greater than or equal to \$12.50, \$15.00, \$17.50, and \$20.00 for any 20 trading days within any period of 30 consecutive trading days during the five-year earn-out period. At each threshold, the target shareholders would receive 25% of the earn-out consideration. It is uncommon for de-SPAC transaction earn-outs to be in the form of cash.

One de-SPAC deal used revenue as the earn-out metric, one used EBITDA, and one contained a metric not publicly disclosed, listed below as "Not Disclosed."

Earn-Out Metrics in De-SPAC Deals



Source: Market Standards

For in-depth discussions of market trends in SPACs and de-SPAC transactions, see [Market Trends 2020/21: Special Purpose Acquisition Companies \(SPACs\)](#) and [Market Trends 2021: De-SPAC Transactions](#), respectively.

Recent Earn-Out Litigation Developments

Delaware courts have continued to strictly construe earn-out provisions, and the gap for inserting terms under the implied covenant of good faith and fair dealing appears to continue to shrink. The end result is that earn-out contractual terms will be interpreted by the court on their face, without regard to arguments about what parties would have negotiated in hindsight. In *S'holder Representative Servs. LLC v. Shire US Holdings, Inc.*, No. 2017-0863-KSJM, 2020 Del. Ch. LEXIS 315 (Del. Ch. Oct. 12, 2020), the Court of Chancery denied earn-out consideration because it strictly interpreted the phrase “as a result of” to mean the only reason. In *S'holder Representative Servs. LLC v. Albertsons Cos.*, No. 2020-0710-JRS, 2021 Del. Ch. LEXIS 115 (Del. Ch. June 7, 2021), the Court of Chancery interpreted “intent” to mean intent in part, and did not accept the implied covenant argument that absent good faith language, buyer was obligated to act in good faith when exercising exclusive control of the acquired company. The court came to a similar result in *Pacira Biosciences, Inc. v. Fortis Advisors LLC*, No. 2020-0694-PAF, 2021 Del. Ch. LEXIS 249 (Del. Ch. Oct. 25, 2021), where the court held that it would not read in an implied covenant to refrain from communicating or influencing the counterparty’s employees because there was no express term in the earn-out to the contrary.

*The above insights are provided by Linda Igarashi and Eugene Choi, attorneys at Sheppard, Mullin, Richter & Hampton LLP. The views expressed herein are those of the authors and do not represent the views of Sheppard, Mullin, Richter & Hampton LLP.

For more on recent developments in Delaware case law related to earn-outs, see [Key Lessons in Drafting Earnout Provisions from Recent Developments in Delaware Case Law](#).

Representative Deals

The following selected deals announced between January 1, 2021, and June 30, 2022, contain example earn-out provisions.

Example 1: [Oak Street Real Estate Capital, LLC / Blue Owl Capital Inc.](#)

Target/Acquiror
Oak Street Real Estate Capital, LLC / Blue Owl Capital Inc.
Filing Date
October 18, 2021
Deal Value
\$950 million
Earn-Out (Revenue)
<u>Section 2.10 Earnout.</u> (a) Earnout. As additional consideration for the Management Company Units held by a Company Group Holder as of immediately prior to the Closing, the holder thereof shall be entitled to (i) its ratable portion of the First Earnout upon the occurrence of a Triggering Event applicable thereto, and (ii) its ratable portion of the Second Earnout upon the occurrence of a Triggering Event applicable thereto, with such ratable portion in each case being determined based on the number of Management Company Units held by such holder as of immediately prior to the Closing relative to the total number of Management Company Units outstanding as of immediately prior to the Closing; provided that, notwithstanding the foregoing, with respect to any Management Company Units that constitute Electing Company Group Units of any holder thereof, a holder that has executed and delivered to Parent each of the following shall be entitled to be issued such holder’s Earnout Units on the Closing Date: (A) each of the Blue Owl LP Agreements, (B) the Exchange Agreement and

(C) an Earnout Restrictions Agreement pursuant to which such holder has agreed to (x) the restrictions on transfer on such Earnout Units more fully described in Section 2.12(b)(iv), and (y) forfeiture of such Earnout Units to the extent such Earnout Units are not earned in accordance with Section 2.12(c) on or prior to the Applicable Earnout Termination Date. The Earnout Units will not be treated as outstanding for U.S. federal income tax purposes, and will only be treated as outstanding for U.S. federal income tax purposes upon the occurrence of a Triggering Event applicable thereto.

...

((c) Triggering Events. The Earnout Payments shall be earned in accordance with this Section 2.12(c), and as a result the applicable Earnout Units shall no longer be subject to the Earnout Restrictions, and the cash portion paid as follows (each such event, a "**Triggering Event**"):

(i) Parent shall pay to the holders of Management Company Units as of immediately prior to the Closing, ratably as determined in accordance with Section 2.12(a), an aggregate amount equal to \$325,000,000 in cash ("First Earnout Cash Consideration") (provided that, with respect to any Management Company Units that are Electing Company Group Units of any holder thereof, such Management Company Units shall, in lieu of the applicable First Earnout Rollover Portion of the First Earnout Cash Consideration to which such Electing Company Group Units would otherwise be entitled to receive, instead convert into a number of First Earnout Units determined by dividing such amount of First Earnout Cash Consideration by the Per Share Price), upon the earlier to occur of: (A) the first full fiscal quarter commencing following the Closing and prior to the Applicable Earnout Termination Date with respect to the First Earnout Units that the Earnout Group receives an amount of Quarterly Management Fee Revenue equal to or greater than \$22,000,000 (the "First Earnout"); provided that in no event shall the payment or vesting of the First Earnout occur pursuant to this clause (A) prior to January 1, 2023; and (B) an Earnout Acceleration Event. Notwithstanding the foregoing, no holder of Management Company Units that received First Earnout Units at Closing shall be entitled to receive any First Earnout Units pursuant to this Section 2.12(c)(i), but such First Earnout Units so issued at Closing shall become vested and no longer subject to the Earnout Restrictions (other than as provided in Section 2.12(b)(iii)).

(ii) Parent shall pay to the holders of Management Company Units as of immediately prior to the Closing, ratably as determined in accordance with Section 2.12(a), an aggregate amount equal to \$331,500,000 in cash ("Second Earnout Cash Consideration") (provided that, with respect to any Management Company Units that are Electing Company Group Units of any holder thereof, such Management Company Units shall, in lieu of the applicable Second Earnout Rollover Portion of the Second Earnout Cash Consideration to which such Electing Company Group Units would otherwise be entitled to receive, instead convert into a number of Second Earnout Units determined by dividing such amount of Second Earnout Cash Consideration by the Per Share Price), upon the earlier to occur of: (A) the first full fiscal quarter commencing following the Closing and prior to the Applicable Earnout Termination Date with respect to the Second Earnout Units that the Earnout Group receives an amount of Quarterly Management Fee Revenue equal to or greater than \$28,000,000 (the "Second Earnout"); provided that in no event shall the payment or vesting of the Second Earnout occur pursuant to this clause (A) prior to January 1, 2024; and (B) an Earnout Acceleration Event. Notwithstanding the foregoing, the First Earnout and the Second Earnout may not be achieved in the same fiscal quarter. Notwithstanding the foregoing, no holder of Management Company Units that received Second Earnout Units at Closing shall be entitled to receive any Second Earnout Units pursuant to this Section 2.12(c)(ii), but such Second Earnout Units so issued at Closing shall become vested and no longer subject to the Earnout Restrictions (other than as provided in Section 2.12(b)(iii)).

Acceleration Provision (Change of Control - Company/Acquiror; Termination of Employment)

Section 2.10 Earnout.

"Earnout Acceleration Event" means the occurrence of any of the following:

(a) any event (or series of related events) where any "person" or "group" (as such terms are used in Section 13(d) and 14(d) of the Exchange Act) is or becomes the "beneficial owner" (as defined in Rules 13d-3 and 13d-5 under the Exchange Act), directly or indirectly, of more than 50% of the voting power of the outstanding voting securities of the Parent Acquired Companies and/or the Earnout Group other than where the acquiring Person is controlled by or under common control of Parent;

(b) any sale of all or substantially all of the assets of the Parent Acquired Companies and/or the Earnout Group to another Person in one transaction or series of related transactions, other than where the acquiring Person is controlled by or under common control of Parent;

(c) the termination of the Key Professional's employment with any member of the Company Group or the Blue Owl Group without Cause (as defined in the Executed Employment Agreement) or the resignation by the Key Professional with Good Reason (as defined in the Executed Employment Agreement); or

(d) a Blue Owl Change of Control.

"Blue Owl Change of Control" means (a) any merger or consolidation of, or other business combination involving, Parent or any of its Subsidiaries, as a result of which the Principals (as defined in the Investor Rights Agreement) would no longer collectively control more than 50% of the voting power of the Equity Securities of the surviving or consolidated Person, or (b) any sale of all or substantially all of the assets of Parent and its Subsidiaries (on a consolidated basis).

"Earnout Group" means, collectively, (a) the Company Group and (b) any other Person that is within the Oak Street real estate division of the Blue Owl Group, other than, with respect to this clause (b), any such Person that is directly or indirectly acquired by Parent following the Closing.

Example 2: [Circle Internet Financial Limited / Concord Acquisition Corp.](#)

Target/Acquiror

Circle Internet Financial Limited / Concord Acquisition Corp.

Filing Date

July 8, 2021

Deal Value

\$4.5 billion

Earn-Out (Share Price)

Section 4.03 Earnout.

((a) Following the Closing, and as additional consideration for the Transactions, within five (5) Business Days after the occurrence of a Triggering Event, the Company Holders and the holders of Company Vested Equity Units and Company Unvested Equity Units set forth in the Rollover Schedule and the Allocation Schedule, shall be issued Topco Ordinary Shares, as referred to below and as set forth opposite such holder's name on the Rollover Schedule and Allocation Schedule, which right shall be equitably adjusted for stock splits, reverse stock splits, stock dividends, reorganizations, recapitalizations, reclassifications, combination, exchange of shares or other like change or transaction with respect to Topco Ordinary Shares occurring on or after the Closing (the "Earnout Consideration", which consideration, for the avoidance of doubt, shall in no circumstances take the form of cash), upon the terms and subject to the conditions set forth in this Agreement; provided, however, that holders of Company Vested Equity Units and holders of Company Unvested Equity Units that are in the employment of the Company at the Closing shall, on the termination of such employment, forfeit any Earnout Consideration attributable to their Company Vested Equity Units or Company Unvested Equity Units and otherwise payable to them. Where any Earnout Consideration is forfeited, such Earnout Consideration shall be reallocated to the holders set forth on the Rollover Schedule and the Allocation Schedule on a pro rata basis. The right to receive the Earnout Consideration is not transferable. The Earnout Consideration shall be issued in the following manner:

(i) Upon the occurrence of Triggering Event I, the number of Topco Ordinary Shares as set forth on the Rollover Schedule and / or the Allocation Schedule (as the case may be);

(ii) Upon the occurrence of Triggering Event II, the number of Topco Ordinary Shares as set forth on the Rollover Schedule and / or the Allocation Schedule (as the case may be);

(iii) Upon the occurrence of Triggering Event III, the number of Topco Ordinary Shares as set forth on the Rollover Schedule and / or the Allocation Schedule (as the case may be); and

(iv) Upon the occurrence of Triggering Event IV, the number of Topco Ordinary Shares as set forth on the Rollover Schedule and / or the Allocation Schedule (as the case may be).

“Triggering Event” means Triggering Event I, Triggering Event II, Triggering Event III and Triggering Event IV, as applicable.

“Triggering Event I” means the date prior to or as of the first anniversary of the Closing Date, on which the volume weighted average sale price of one Topco Ordinary Share quoted on the New York Stock Exchange (or the exchange on which the Topco Ordinary Shares are then listed) is greater than or equal to \$12.00 for any 20 Trading Days within any 30 consecutive Trading Day period.

“Triggering Event II” means the date prior to or as of the third anniversary of the Closing Date, on which the volume weighted average sale price of one Topco Ordinary Share quoted on the New York Stock Exchange (or the exchange on which the Topco Ordinary Shares are then listed) is greater than or equal to \$14.00 for any 20 Trading Days within any 30 consecutive Trading Day period.

“Triggering Event III” means the date prior to or as of the fifth anniversary of the Closing Date, on which the volume weighted average sale price of one Topco Ordinary Share quoted on the New York Stock Exchange (or the exchange on which the Topco Ordinary Shares are then listed) is greater than or equal to \$16.00 for any 20 Trading Days within any 30 consecutive Trading Day period.

“Triggering Event IV” means the date prior to or as of the tenth anniversary of the Closing Date, on which the volume weighted average sale price of one Topco Ordinary Share quoted on the New York Stock Exchange (or the exchange on which the Topco Ordinary Shares are then listed) is greater than or equal to \$100.00 for any 20 Trading Days within any 30 consecutive Trading Day period.

Acceleration Provision (Change of Control – Acquiror)

Section 4.03 Earnout.

(c) If, during the Earnout Period, there is a Change of Control, each Triggering Event that has not yet occurred (and has not previously expired) as of immediately prior to the Change of Control shall be deemed to have occurred if the price per share in the Change of Control equals or exceeds the applicable price target described in the applicable Triggering Event, and the Earnout Consideration (or any applicable portion thereof) will be deemed to have been issued immediately prior to the consummation of such Change of Control.

“Change of Control” means any transaction or series of transactions (a) following which a person or “group” (within the meaning of Section 13(d) of the Exchange Act) of persons (other than the Company Holders), has direct or indirect beneficial ownership of securities (or rights convertible or exchangeable into securities) representing more than fifty percent (50%) of the voting power of or economic rights or interests in Topco, (b) constituting a merger, consolidation, reorganization or other business combination, however effected, following which, the voting securities of Topco immediately prior to such merger, consolidation, reorganization or other business combination do not continue to represent or are not converted into fifty percent (50%) or more of the combined voting power of the then outstanding voting securities of the person resulting from such combination or, if the surviving company is a subsidiary, the ultimate parent thereof, or (c) the result of which is a sale of all or substantially all of the assets of Topco to any person.

Example 3: [First Wave Bio, Inc. / Azurrx Biopharma, Inc.](#)

Target/Acquiror

First Wave Bio, Inc. / Azurrx Biopharma, Inc.

Filing Date

September 13, 2021

Deal Value

\$229 million

Earn-Out (Net Sales)Section 2.14. Milestone Payments.

(a) Within five (5) days following the first achievement of each of the milestone events described in the **following table*** (each, "Milestone Event"), Buyer shall notify the Shareholders' Representative in accordance with Section 8.1 that such Milestone Event has been achieved. Buyer shall, following the delivery of such notice and in any event within ninety (90) days following the achievement of a Milestone Event in either the COVID Field and ICI-AC Field and within forty-five (45) days following the achievement of a Milestone Event in the IBD Field, pay or cause to be paid in cash to the Paying Agent (for the benefit of the Sellers) the applicable milestone payment listed in the applicable row for such Milestone Event ("Milestone Payment") in accordance with Section 2.14, provided however with respect to the IBD Field Milestone Event, the Buyer shall have the option in its sole and full discretion to pay up to 25% of each such applicable Milestone Payment in the form of Buyer Common Stock; in each such event, within five (5) Business Days following the achievement of an IBD Field Milestone Event, Buyer shall notify the Shareholders' Representative in accordance with Section 8.1 that such IBD Field Milestone Event has been achieved, and the number of shares of Buyer Common Stock being issued and the Buyer Milestone Stock Price and shall issue the Buyer Common Stock to the Sellers in accordance with Schedule I within forty-five (45) days following the achievement of the applicable Milestone Event in the IBD Field.

*Omitted table can be found in Section 2.14(a) [here](#).

Net Sales shall not include transfers or dispositions for charitable, promotional, pre-clinical, clinical, regulatory, or governmental purposes. Subject to the above, Net Sales shall be calculated in accordance with the standard internal policies and procedures of Buyer, its Affiliates, or sublicensees, which must be in accordance with GAAP. For purposes of determining Net Sales, a Product will be deemed to be sold when invoiced. A particular deduction may only be accounted for once in the calculation of Net Sales. Net Sales will exclude any samples of a Product transferred or disposed of at no cost, or cost below Buyer's cost of goods for such Product, for promotional, development, or educational purposes.

In the event a Product is sold as part of a combination product in a country, the Parties will negotiate, reasonably and in good faith, an adjustment to Net Sales with respect to the combination product in such country to account for any value attributable to active ingredients included in the combination product other than the Compound.

For clarity, Net Sales will be calculated on an accrual basis, in a manner consistent with Buyer's internal accounting policies, as consistently applied. To the extent any accrued amounts used in the calculation of Net Sales are estimates, such estimates shall be trued-up in accordance with Buyer's internal accounting policies, consistently applied, and Net Sales and related payments under this Agreement shall be reconciled as appropriate.

Example 4: [Novitium Pharma LLC / ANI Pharmaceuticals, Inc.](#)

Target/Acquiror

Novitium Pharma LLC / ANI Pharmaceuticals, Inc.

Filing Date

March 9, 2021

Deal Value

\$163.5 million

Earn-Out (Gross Margin)

Section 1.12 Earn-Out.

(a) Subject to the following terms and conditions, Parent shall make the following payments, if any, to the Exchange Agent (for distribution to the Company Members in accordance with their respective Pro Rata Percentages) (collectively, the “Earn-Out Payments”):

(i) An amount of up to \$25 million (the “Gross Profit Earn-Out”) shall be payable as follows:

(A) An amount up to \$12.5 million in the aggregate (the “GP Earn-Out”) shall be payable as follows: if during the first 24 months starting on the first day of the month following the month in which the Closing occurs (the “Gross Profit Earn-Out Period”), the Gross Profit generated by the Novitium Portfolio minus Required CapEx is greater than or equal to \$95 million, Parent will pay an amount, not to exceed \$12.5 million, calculated by multiplying \$12.5 million by a fraction, (i) the numerator of which is the amount by which (A) the Gross Profit generated during the Gross Profit Earn-Out Period minus Required CapEx made during the Gross Profit Earn-Out Period exceeds (B) \$80 million, and (ii) the denominator of which is \$25 million; and

(B) An amount equal to \$12.5 million (the “ANDA Filing Earn-Out”) if the Company makes all of the FDA Filings during the Gross Profit Earn-Out Period with respect to all of the Existing Pipeline ANDAs (which list shall be subject to adjustment both prior to and following the Closing upon mutual agreement of Parent and the Key Persons);

provided, in the case of each of clauses (A) and (B), that the annualized R&D expenses of the Company in respect of the Novitium Portfolio and the Existing Pipeline ANDAs relevant to the calculation of the Gross Profit Earn-Out do not exceed \$16 million per year for each year during the Gross Profit Earn-Out Period (“R&D Expenses”); and/or

(ii) Another amount up to \$21.5 million (the “505(b)(2) Earn-Out”) shall be payable as follows: Out of the Net Profit generated by the 505(b)(2) Products, the Company Members shall receive 20%, payable on a quarterly basis until the earlier to occur of (i) the sum of all such payments being equal to \$21.5 million in the aggregate and (ii) the tenth anniversary of FDA Approval of the applicable 505(b)(2) Product.

Acceleration Provision (Termination of Employment)

Section 1.12 Earn-Out.

(d) If a Key Person is terminated by Parent or its Subsidiaries without Cause (as defined in such Key Person’s Employment Agreement) or resigns from Parent or its Subsidiaries for Good Reason (as defined in such Key Person’s Employment Agreement), in each case, following the Closing but prior to the end of the Gross Profit Earn-Out Period, such Key Person’s pro rata portion (determined (i) if such Key Person is a Principal Member in his individual capacity, by reference to the Pro Rata Percentage of such Principal Member, (ii) if such Key Person is (or is also) a direct or indirect holder of Equity Interests in a Principal Member, by multiplying (A) the Pro Rata Percentage of the Principal Member of which such Key Person owns Equity Interests by (B) a fraction, the numerator of which is the number of Equity Interests directly or indirectly held by such Key Person in such Principal Member and the denominator of which is the sum of all outstanding Equity Interests of such Principal Member or (iii) if such Key Person is both a Principal Member in his individual capacity and the direct or indirect owner of Equity Interests in a Principal Member, by adding together the Pro Rata Percentages calculated pursuant to subclauses (i) and (ii) above) of any Gross Profit Earn-Out that has not yet been earned and/or paid shall become payable in full by Parent to the Principal Member (in the case of a Key Person that is a Principal Member in his individual capacity) and/or, as applicable, the Principal Member of which such Key Person directly or indirectly owns Equity Interests for distribution to such Key Person in accordance with the foregoing parenthetical.

Example 5: [Guide Therapeutics, Inc. / Beam Therapeutics Inc.](#)

Target/Acquiror

Guide Therapeutics, Inc. / Beam Therapeutics Inc.

Filing Date
February 23, 2021
Deal Value
\$120 million
Earn-Out (Milestone Event)
Section 2.18. Milestone Payments.
(a) Technology Success Milestones. Buyer shall make the payments described in Table 1* below (each, a “Technology Success Milestone Payment”), following first achievement or first occurrence of the corresponding event with respect to a Company Product developed by the Company or Buyer, its Affiliates or a Rights Transferee or any Affiliate thereof (each, a “Technology Success Milestone Event”) described in the row to the left of such payment in Table 1.
<i>*Omitted table can be found in Section 2.18(a) here.</i>
“ Company Product ” means any product or technology (1) that is or was researched, developed, tested, labeled, manufactured, stored, imported, exported, marketed or distributed by or on behalf of the Company on or before the date of this Agreement or at any time thereafter prior to the Closing Date, (2) that uses, incorporates, or is developed using any Company Intellectual Property or (3) the research, development, testing, labeling, manufacturing, storage, importation, exportation, marketing or distribution of which would, without a license or ownership under the relevant Patent, infringe a claim in any issued Patent, or infringe a claim in any pending Patent application (if such patent application were to issue as a patent) (i) in the Company Intellectual Property or (ii) filed on any Know-How that is included in or derived from any Company Intellectual Property, whether such claim is in the form of such claim as of the date hereof, as of the Closing Date or at any time thereafter, including in each case any LNP structure listed in Section 1.54 of the Disclosure Schedule.
(b) Product Milestones. Buyer shall make the payments described in Table 2 below (each, a “Product Milestone Payment”), following first achievement or first occurrence of the corresponding event with respect to LNP Products developed by the Company or Buyer, its Affiliates or a Rights Transferee or any Affiliate thereof (each a “Product Milestone Event”) described in the row to the left of such payment in Table 2.
<i>*Omitted table can be found in Section 2.18(b) here.</i>
“ LNP Product ” means any Company Product that (i) Targets [**] utilizing LNPs generated by use of the Company LNP Discovery Platform [**] Covered by a Valid Claim in the Patents included within the Company Registered IP or (ii) Targets (A) [**] or (B) [**] utilizing, in each case, LNPs generated by use of the Company LNP Discovery Platform [**] Covered by a Valid Claim in the Patents included within the Company Registered IP.

Example 6: [Southland Holdings LLC / Legato Merger Corp. II](#)

Target/Acquiror
Southland Holdings LLC / Legato Merger Corp. II
Filing Date
May 25, 2022
Deal Value
\$498 million
Earn-Out (EBITDA)
Section 1.13. Earnout Merger Consideration; Company Representative; Parent Representative.
(a) If, for the fiscal year of Parent ending December 31, 2022, Parent has Adjusted EBITDA equal to or greater than \$125,000,000 (the “2022 Base Target”), Parent shall issue to the holders of Company Membership Interests outstanding

immediately prior to the Effective Time, in the aggregate, 3,448,276 shares of Parent Common Stock, allocated among the holders of each Company Membership Interest in accordance with the terms of Section 1.6(a); provided that if Parent has Adjusted EBITDA equal to or greater than \$145,000,000 (the "2022 Bonus Target"), then the aggregate number of shares of Parent Common Stock to be issued to the holders of Company Membership Interests shall be increased to 5,172,414 shares, similarly allocated among the holders of each Company Membership Interest in accordance with the terms of Section 1.6(a).

(b) If, for the fiscal year of Parent ending December 31, 2023, Parent has Adjusted EBITDA equal to or greater than \$145,000,000 (the "2023 Base Target"), Parent shall issue to the holders of Company Membership Interests outstanding immediately prior to the Effective Time, in the aggregate, 3,448,276 shares of Parent Common Stock, allocated among the holders of each Company Membership Interest in accordance with the terms of Section 1.6(a); provided that if Parent has Adjusted EBITDA equal to or greater than \$165,000,000 (the "2023 Bonus Target"), then the aggregate number of shares of Parent Common Stock to be issued to the holders of Company Membership Interests shall be increased to 5,172,414 shares, similarly allocated among the holders of each Company Membership Interest in accordance with the terms of Section 1.6(a).

Example 7: [ProSomnus Holdings Inc. / Lakeshore Acquisition I Corp.](#)

Target/Acquiror

ProSomnus Holdings Inc. / Lakeshore Acquisition I Corp.

Filing Date

May 10, 2022

Deal Value

\$125 million

Earn-Out (Share Price)

Section 1.21 Earnout.

(a) Following the Closing, as additional consideration for the Company interests acquired in connection with the Merger, within five (5) Business Days after the occurrence of a Triggering Event, the Purchaser shall issue or cause to be issued to the Eligible Company Security Holders, based on their respective Pro Rata Earnout Shares, with respect to such Triggering Event the following shares of Purchaser Common Stock (which shall be equitably adjusted for stock splits, reverse stock splits, stock dividends, reorganizations, recapitalizations, reclassifications, combination, exchange of shares or other like change or transaction with respect to Purchaser Common Stock occurring after the Closing) (the "Earnout Shares") constituting the Earnout Consideration (which Earnout Shares, for the avoidance of doubt, shall be issued as shares of Purchaser Common Stock to all Eligible Company Security Holders based on their respective Pro Rata Share), upon the terms and subject to the conditions set forth in this Agreement and the Ancillary Documents:

(i) upon the occurrence of Triggering Event I, a one-time issuance of an aggregate of 1,000,000 Earnout Shares;

(ii) upon the occurrence of Triggering Event II, a one-time issuance of an aggregate of 1,000,000 Earnout Shares; and

(iii) upon the occurrence of Triggering Event III, a one-time issuance of an aggregate of 1,000,000 Earnout Shares.

"Triggering Event I" means the date on which the volume-weighted average price per share of Purchaser Common Stock is equal to \$12.50 or greater for 20 Trading Days in any consecutive 30 Trading Day period within the Earnout Period.

"Triggering Event II" means the date on which the volume-weighted average price per share of Purchaser Common Stock is equal to \$15.00 or greater for 20 Trading Days in any consecutive 30 Trading Day period within the Earnout Period.

"Triggering Event III" means the date on which the volume-weighted average price per share of Purchaser Common Stock is equal to \$17.50 or greater for 20 Trading Days in any consecutive 30 Trading Day period within the Earnout Period.

"Triggering Events" means Triggering Event I, Triggering Event II and Triggering Event III, collectively.

Acceleration Provision (Change of Control – Acquiror)

Section 1.21 Earnout.

(c) If, during the Earnout Period, there is a Change of Control, (A) the Purchaser shall issue 3,000,000 shares of Purchaser Common Stock (less any Earnout Shares issued prior to such Change of Control pursuant to Section 1.21(a)) to the Eligible Company Security Holders with respect to the Change of Control, and (B), thereafter, this Section 1.21 shall terminate and no further Earnout Shares shall be issuable hereunder.

“**Change of Control**” means any transaction or series of transactions the result of which is: (a) the acquisition by any Person or “group” (as defined in the Exchange Act) of Persons of direct or indirect beneficial ownership of securities representing 50% or more of the combined voting power of the then outstanding securities of the Purchaser; (b) a merger, consolidation, reorganization or other business combination, however effected, resulting in any Person or “group” (as defined in the Exchange Act) acquiring at least 50% of the combined voting power of the then outstanding securities of the Purchaser or the surviving Person outstanding immediately after such combination; or (c) a sale of all or substantially all of the assets of the Purchaser and its Subsidiaries, taken as a whole.

Example 8: [Even Financial, Inc. / MoneyLion Inc.](#)

Target/Acquiror

Even Financial, Inc. / MoneyLion Inc.

Filing Date

December 16, 2021 (first filing date)

Deal Value

\$360 million

Earn-Out (Revenue)

Section 2.15. Earnout Payment.

(a) Earnout Payment. As additional consideration to the Equityholders hereunder, the Equityholders shall be entitled to receive an additional payment in the form of Parent Preferred Stock or Parent Common Stock, as applicable, in an aggregate amount equal to the Earnout Amount (such payment, the “Earnout Payment”) as set forth in this Section 2.15. The Earnout Payment shall be paid (net of any Transaction Expenses triggered by the Earnout Payment) as and when required by Section 2.15(d), and shall be subject to the review and dispute procedures set forth in Section 2.15(c). Under no circumstance shall the Earnout Payment payable hereunder be greater than \$80,000,000 (valuing the Parent Preferred Stock or Parent Common Stock, as applicable, at the Conversion Price).

“**Earnout Amount**” means (i) if the Earnout Period Revenue is less than \$80,000,000, then \$0, (ii) if the Earnout Period Revenue is at least \$80,000,000 but less than \$100,000,000, the amount set forth opposite of the Earnout Period Revenue Threshold on Schedule V that is closest to, but less than, the Earnout Period Revenue, (iii) if the Earnout Period Revenue is equal to or greater than \$100,000,000 and less than \$126,400,000, and falls between two Earnout Period Revenue Thresholds on Schedule V, the Earnout Amount shall be determined by linear interpolation between the Earnout Amounts set forth opposite such two Earnout Period Revenue Thresholds based on the amount by which Earnout Period Revenue exceeds the lower such Earnout Period Revenue Threshold relative to the difference between such two Earnout Period Revenue Thresholds and (iv) if the Earnout Period Revenue is equal to or greater than \$126,400,000, \$80,000,000. By way of example, (x) if the Earnout Period Revenue is \$92,500,000, the Earnout Amount shall be \$28,000,000 and (y) if the Earnout Period Revenue is \$110,767,045, the Earnout Amount shall be \$70,000,000.

Linda Igarashi, Partner, Sheppard, Mullin, Richter & Hampton LLP

Linda Igarashi is a partner in the Corporate Practice Group in the firm's Orange County office and is a member of the firm's Healthcare, Private Equity, Food and Beverage, and Latin America teams.

Linda represents public and private companies, private equity firms, strategic investors and financial institutions. Her practice encompasses mergers and acquisitions, joint ventures, private equity investments, debt and equity financing, business formation and structuring, and general corporate governance matters. She is a tireless advocate and trustworthy advisor in complex M&A transactions. She combines her M&A expertise and relationship skills to work effectively with all parties to structure mutually beneficial transactions. She also represents clients in cross-border transactions, particularly in Mexico, and is fluent in Spanish.

Prior to her legal career, Linda worked as a financial analyst with the Federal Reserve Bank and as a risk management consultant with Deloitte, and she brings this experience to her transactional practice. Linda's diverse experience and perspective from all sides of the transaction is instrumental in the attainment of her client's goals through practical solutions as well as balanced legal risk.

Linda co-leads Sheppard Mullin's Orange County Diversity and Inclusion Working Group.

Eugene Choi, Associate, Sheppard, Mullin, Richter & Hampton LLP

Eugene Choi is an associate in the Corporate Practice Group in the firm's Orange County office.

Eugene's practice encompasses a variety of corporate and securities matters, including mergers and acquisitions, public and private securities offerings, private equity, venture capital financing, business formation and structuring, joint ventures, and corporate governance matters.

He previously served as a law clerk to the Honorable Karen L. Valihura of the Delaware Supreme Court. He is a Chartered Alternative Investment Analyst (CAIA) Charterholder and has passed Level 1 of the Chartered Financial Analyst (CFA) series.

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