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Case Number 47,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ILLINOIS NATIONAL INSURANCE COMPANY, and FEDERAL INSURANCE COMPANY,	:	C.A. No. 47,2025
Defendants-Below/Appellants,	:	Appeal from Delaware Superior Court, C.A. No. N22C-05-098 PRW (CCLD) (Wallace, J.)
v.	:	
HARMAN INTERNATIONAL INDUSTRIES, INCORPORATED,	:	Original Filed: March 28, 2025 Public Version Filed: April 11, 2025
Plaintiff-Below/Appellee.	:	

OPENING BRIEF OF APPELLANTS ILLINOIS NATIONAL INSURANCE COMPANY AND FEDERAL INSURANCE COMPANY

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NATURE OF PROCEEDINGS

This insurance coverage dispute arises out of a settlement reached by Appellee Harman International Industries, Inc. ("Harman") to resolve a class action lawsuit by its former shareholders—*Baum v. Harman International Industries Inc., et al.*, Case No. 3:17-cv-00246-RNC (D. Conn.) (the "*Baum* Action"). The *Baum* Action alleged that Harman sold its stock at an artificially low price as part of its acquisition by Samsung Electronics Co., Ltd. ("Samsung"). It further alleged that Harman's leadership convinced shareholders to vote in favor of the acquisition at a deflated and inadequate share price based on false and misleading information. As a remedy, the *Baum* Action sought ***only one*** measure of damages for Harman's former shareholders: the difference between the price that should have been paid for their shares and the price they actually received.

The litigation concluded with a $28 million settlement—effectively increasing the consideration paid for the acquisition. Thereafter, Harman sought to recoup this amount under a directors-and-officers insurance policy issued by Appellant Illinois National Insurance Company ("Illinois National"), as well as under a follow-form policy issued by excess carrier Federal Insurance Company ("Federal"). The policies grant coverage for "Loss," a defined term. As defined, there is no agreement to insure any settlement that (1) resolves a "Claim alleging that the price or consideration paid . . . for the acquisition . . . of all or substantially all the

ownership interest in or assets of an entity is inadequate," and (2) "represent[s] the amount by which such price or consideration is effectively increased." Commonly called the "Bump-Up Provision," this clause avoids the moral hazard of having insurance companies subsidize corporate transactions:

> How much a company is worth depends on the market, but bidders would like to shift the cost to a third party if possible. Suppose Company X is worth $100 million. Company Y agrees to buy X for $80 million and promises that X's shareholders will be made whole. The shareholders sue, contending that X has withheld the "fact" that the company is worth $100 million. X and Y settle that claim for $20 million and turn to their insurer for indemnity. The shareholders get their $100 million, but if this maneuver works Y completes the purchase for only $80 million, with the rest coming from insurance. . . . [A]n inadequate-consideration clause means that Y, not the insurer, pays the target's full market value.[1]

Yet, shifting the cost of Harman's acquisition onto insurers is precisely what is being sought here. Notwithstanding that the sole monetary remedy sought in the *Baum* Action was an increase in consideration for the acquisition, the Superior Court held that the Bump-Up Provision did not apply and that indemnity coverage exists for the settlement. This was error.

First, although the Bump-Up Provision requires only a "Claim ***alleging***" inadequate consideration, the decision below inserts a requirement that the allegations in the underlying action must give rise to a "viable" remedy. In doing so,

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[1] *Komatsu Mining Corp. v. Columbia Cas. Co.*, 58 F.4th 305, 307-08 (7th Cir. 2023).

the Superior Court reads language into the Bump-Up Provision that does not exist. Moreover, its decision that the allegations in the *Baum* complaint were not viable directly conflicts with the *Baum* court's own rulings in the case prior to the settlement.

Second, the decision below determined the settlement did not "represent[] the amount by which such price or consideration is effectively increased." In reviewing the underlying evidence, the Superior Court ignored evidence from the *Baum* Action as to what the settlement represents to the class of Harman shareholders. Instead, the court presented its own test, narrowly focused on the insured's motivation to settle—which may explain ***why*** an insured decides to pay the settlement amount, but not ***what*** the settlement amount represents.

It is the province of the judiciary to interpret contracts, not rewrite them. The decision below is at odds with well-settled principles of insurance contract interpretation and is a noticeable outlier compared to other bump-up decisions nationwide. Moreover, if allowed to stand, the decision would require courts, in adjudicating insurance coverage suits, to act, effectively, as an appellate court in reviewing the "soundness" of another court's rulings. Under the circumstances, this Court should reverse.

SUMMARY OF ARGUMENT

1. The Bump-Up Provision applies to the *Baum* Action because the plain language requires only a "Claim ***alleging***" inadequate consideration. The ***only*** theory of damages the *Baum* plaintiff ever pressed was an increase in consideration, and the *Baum* court ***twice*** ruled this allegation satisfied the loss-causation requirements for purposes of an alleged violation of Section 14(a) of the Securities Exchange Act.

The Superior Court expressly acknowledged that the *Baum* Action alleged inadequate consideration. Nonetheless, it held that the Bump-Up Provision was inapplicable because, contrary to the *Baum* court's rulings, it concluded that damages for inadequate deal price are not a "viable" remedy for a Section 14(a) violation. There is no language in the Bump-Up Provision that gives rise to a viability requirement. Nor did the decision below cite any case, in any jurisdiction, that has read such a requirement into identical or similar bump-up provisions. Indeed, the ruling is out of step with the body of insurance cases applying similar bump-up provisions where the underlying action alleged inadequate deal consideration for a Section 14(a) violation.

Moreover, inserting such a requirement creates irreconcilable conflicts with other provisions in the Policy in contravention of basic principles of contract interpretation. Finally, if the decision stands, it will require courts presiding over

insurance coverage disputes to act as appellate courts on matters already addressed by courts in the underlying cases. This is particularly problematic when the underlying issues involve matters of ***federal*** law and the insurance coverage dispute is being decided by a ***state*** court—as is often the case in matters involving directors-and-officers insurance policies that provide coverage to corporations for "Securities Claims," as here.

2. The *Baum* Action settlement "represent[s] the amount by which [the] consideration [paid for the acquisition of Harman] is effectively increased." The terms "effectively" and "represent" make clear that the inquiry is aimed at discerning the "real result" or what happened "in essence." The *Baum* plaintiff alleged that the $112.00 per share consideration the Harman shareholders received was inadequate; the only theory of damages she advanced in discovery was the inadequacy of deal consideration; and, in seeking final approval of the settlement, the plaintiff's counsel testified regarding the "possible range of recovery" with reference only to the "fair value" of Harman's stock "less the $112 per share" that the shareholders received. The settlement agreement's language also confirms that the settlement represents an effective increase in deal price, as it directs that settlement proceeds be distributed to shareholders on a ***pro rata, per share*** basis.

The Superior Court erred in eschewing the plain language of the Bump-Up Provision, which focuses inquiry on the allegations the settlement resolves. Instead,

the Superior Court devised its own four-factor test, which is narrowly focused on the benefits flowing to Harman from the settlement. In doing so, the court: (1) disregarded the weight of authority focusing on the underlying allegations resolved by the settlement; (2) ignored evidence establishing what the settlement amount represented to the shareholders; (3) misapprehended the composition of the settlement class; and (4) relied on its own "speculative" settlement valuation to conclude that, in its view, the settlement could not represent a bump-up in consideration because the settlement amount was too small.

STATEMENT OF FACTS

A. Factual Background

1. Samsung Acquires Harman.

In November 2016, Harman and Samsung announced Samsung's proposed acquisition of Harman. A2808.[2] Harman stockholders voted in favor of the transaction in February 2017. A2943. The transaction was completed a few weeks later. A2819. Harman shareholders were paid $112 per share in cash and ceased to have any interest in Harman. A2830.

2. Harman's Shareholders File the *Baum* Action Alleging Inadequate Consideration.

In February 2017, Harman shareholder Patricia Baum filed a putative securities class action complaint in Connecticut federal court. A2218.[3] The complaint asserted that the price received for Harman stock in connection with its acquisition was insufficient. A2955-56. This was the sole claim for relief. The *Baum* complaint alleged that Harman leadership, in particular its CEO and Chairman, Dinesh Paliwal, caused Harman to be sold at an artificially low price because, during the period in which Harman was for sale, Samsung agreed to significantly increase

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[2] Citations to "A" refer to the Appellants' Appendix to the Opening Brief filed contemporaneously herewith.

[3] In July 2017, after Harman's acquisition was complete, the plaintiff filed her operative complaint. A2953. All references and citations to the allegations in the *Baum* Action are to the operative complaint.

Mr. Paliwal's compensation were he to remain as CEO post-acquisition. A2951-52. The complaint alleged that, to secure shareholder approval for the sale, Harman's proxy solicitation materials depicted an overly pessimistic economic projection for Harman. A2911-12. The complaint concluded that this deception resulted in shareholders approving the sale without an accurate analysis of a truly fair share price, which the complaint alleged to be around $116 per share. A2913-14, A2937, A2943. According to the complaint, the shareholders suffered damages in the form of inadequate consideration:

> [A]s a direct and proximate result of the dissemination of the false and/or misleading Proxy defendants used to obtain shareholder approval of and thereby consummate the Acquisition, Plaintiff and the Class have suffered damage and actual economic losses (i.e., ***the difference between the price Harman shareholders received and Harman's true value at the time of the Acquisition***) in an amount to be determined at trial.

A2956 (emphasis added); *see also* A2950.

Based on these allegations, the plaintiff asserted violations of Sections 14(a) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78n(a), §78t(a). Throughout the course of the *Baum* Action, the plaintiff consistently pursued a single theory of loss—inadequate consideration—and sought only one measure of damages to remedy that loss—the difference between the price Harman shareholders received and Harman's true value at the time of the acquisition. A3000; A3022-23.

3. The *Baum* Court's Decisions on Loss Causation.

Harman moved to dismiss the *Baum* Action, arguing that the complaint's allegations, even if true, did not state a valid claim. A3549, A3550-51. In relevant part, Harman argued the plaintiff could not recover damages in the form of "the difference between the price Harman shareholders received and Harman's true value at the time of the Acquisition" for an alleged violation of federal disclosure laws. A3583-84, 3557-58.

In October 2019, the *Baum* court denied the motion. A3040, A3086. As to loss causation, the court held the "plaintiff has adequately pled loss causation by asserting that Harman shareholders did not receive adequate compensation in the acquisition." A3040; *see also* A3084-85 (quoting *Suez Equity Inv'rs, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 97-98 (2d Cir. 2001), for the proposition that "[P]laintiffs may allege . . . loss causation by averring . . . that the defendants' misrepresentations induced a disparity between the transaction price and the true 'investment quality' of the securities at the time of transaction").

A few months later, Harman moved for judgment on the pleadings on the same issue and for the same reasons, which the court treated as a motion for reconsideration. A5055. Again, Harman argued that the plaintiff failed to plead loss causation and observed that "Plaintiff's entire theory of harm is predicated on her claim that Harman, which was trading at $86 per share on the day before the merger

was announced, was actually worth more than ***$112 per share*** offered by the proposed merger." A5099.

In September 2021, the district court denied Harman's motion for judgment on the pleadings. *See Baum v. Harman Int'l Indus.*, 575 F. Supp. 3d 289 (D. Conn. 2021). The court reaffirmed its holding that the plaintiff had adequately pled loss causation by alleging that "Harman's senior management (1) misrepresented the Management Projections as having more downside risk than upside potential, and (2) the misrepresentation was damaging to her because it resulted in approval of the merger at a price below the fair value of her shares." *Id.* at 293, 298-301.

4. Harman Settles the *Baum* Action.

Just five months after this ruling, Harman agreed to settle the *Baum* Action for $28 million. In seeking final approval of the settlement, the plaintiff's counsel testified regarding the "possible range of recovery" with reference only to the "fair value" of Harman's stock "less the $112.00 per share" that the shareholders received. A3107. While the parties disputed the existence and amount of the delta, no one disputed that it was the only measure of damages that the *Baum* plaintiff sought. *Id*.

As set forth in the Stipulation of Settlement, "[t]he Settling Parties intend[ed] this Settlement to be a final and complete resolution of all disputes between them with respect to the Litigation." A2254. "Litigation" is defined as the *Baum* Action,

and the "Settling Parties" are defined to include Harman and the class members. A2234, A2236.

In addition, the parties agreed to a "Plan of Allocation," which provided distribution of the settlement funds "on a pro rata basis," such that "[i]f 100% of shares outstanding on the record date submit a claim, each share's average distribution under the Settlement will be approximately $0.40 per share . . . ." A2283.

5. The Bump-Up Provision in Harman's Directors & Officers Insurance Policy.

Illinois National issued the primary directors-and-officers insurance policy at issue, with an effective period of January 29, 2016, through January 29, 2017 (the "Policy"). A3397. The Policy is subject to a $15 million limit of liability in excess of a $1.5 million Retention applicable to Securities Claims, as defined below. *Id.* Federal's excess policy provides coverage in excess of the Policy and follows form to the definition of Loss at issue here. A3512. The Policy provides certain coverage for Harman's losses arising from its indemnification of Insured Persons, including Harman management named as defendants in the *Baum* Action, as well as Harman itself, as follows:

B. Indemnification of Insured Person Coverage:

This policy shall pay the **Loss** of an **Organization** that arises from any:

> (1) **Claim** … made against any **Insured Person** … for any Wrongful Act of such Insured Person
>
> …

C. Organization Coverage:

This policy shall pay the **Loss** of any **Organization**:

> (1) arising from any **Securities Claim** made against such **Organization** for any **Wrongful Act** of such **Organization** …

A3401.[4]

The Policy defines a **Claim**, in relevant part, as "a civil … proceeding for monetary, non-monetary or injunctive relief" including "any **Securities Claim**." A3417. A "**Securities Claim**" means certain Claims made against any Insured "alleging a violation of any law, rule or regulation, whether statutory or common law." A3441.

The Policy defines **Loss**, in relevant part, with the Bump-Up Provision italicized, as:

> [D]amages, settlements, judgments (including pre/post-judgment interest on a covered judgment), **Defense Costs** … *In the event of a **Claim** alleging that the price or consideration paid or proposed to be*

[4] Terms appearing in bold are defined by the Policy and ascribed those meanings herein.

> *paid for the acquisition or completion of the acquisition of all or substantially all the ownership interest in or assets of an entity is inadequate,* ***Loss*** *with respect to such* ***Claim*** *shall not include any amount of any judgment or settlement representing the amount by which such price or consideration is effectively increased; provided, however, that this paragraph shall not apply to* ***Defense Costs*** *or to any* ***Non Indemnifiable Loss*** *in connection therewith*.

A3421-22 (emphasis added).

6. The Insurers Deny Coverage for a Settlement Based on the Bump-Up Provision.

On July 20, 2017, after the *Baum* Action was filed, Illinois National issued a coverage letter acknowledging the *Baum* Action as a Securities Claim under the Policy and agreeing to pay defense costs, subject to a full reservation of rights. A3526. In December 2021, Illinois National issued a supplemental coverage letter denying coverage for any potential settlement in the *Baum* Action based on the Bump-Up Provision. A3540-42.

B. Procedural History

In May 2022, Harman filed this lawsuit against Illinois National, Federal, and Berkley Insurance Company, seeking indemnity coverage for the $28 million settlement in the *Baum* Action. A0069.

In July 2022, Illinois National and Federal moved to dismiss the complaint based on the Policy's Bump-Up Provision. A0291. In response, Harman moved for summary judgment, seeking a ruling that it was entitled to coverage notwithstanding the Bump-Up Provision. A0441, A0455.

The Superior Court issued its initial decision in April 2023. Ex. C. In relevant part, the court held that, for the Bump-Up Provision to apply, three elements must be met:

> (1) the transaction must be 'an acquisition of all or substantially all of an entity's assets or ownership';
>
> (2) the *Baum* Action settlement must be related only to the allegation of inadequate consideration; and
>
> (3) the *Baum* Action settlement must represent an effective increase in consideration.

Id. at 22 (relying on *Northrop Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 347015, at *20-21 (Del. Super.)). The Superior Court determined it needed a more developed record and denied both motions. *Id*. at 22, 24, 28.

After discovery, the parties subsequently cross-moved for summary judgement on the applicability of the Bump-Up Provision. A1716, A2755. The Superior Court heard oral argument on August 1, 2024, and held a supplemental hearing on December 18, 2024. A6064, A6176, A6178.

On January 7, 2025, the Superior Court issued its decision. This time, the court set forth an admittedly new test for determining whether the Bump-Up Provision applied:

> (1) the settlement must be related to an underlying acquisition;
>
> (2) inadequate deal price must be a viable remedy that was sought for at least one claim in the *Baum* Action; and

(3) the settlement, or a portion of the settlement, must represent an effective increase in consideration.

Ex. B at 14.[5] Acknowledging that this standard differed from the one that it previously articulated, the court noted its "refine[ment of] its articulation of the conditions" following its "re-examin[ation of] the relevant language and the parties' cross-motion positions." *Id.* at 14 n.68. The decision cited no relevant authority for the "refined" test. *Id*.

The Superior Court held the transaction involving Harman was an "acquisition," satisfying its first element. Ex. B at 5-10. The court determined its second element was not satisfied, reasoning that "damages for inadequate deal price were not a viable remedy requested in the *Baum* Action" because "by the very nature of a Section 14(a) (and Section 20) claim, plaintiffs could *not* have sought 'a revised appraisal of the equity they sold.'" *Id.* at 20, 22 n.94 (citing *Northrop Grumman*, 2021 WL 347015, at *20; *Mack v. Resolute Energy Corp*., 2020 WL 1286175, at *11 (D. Del.)).

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[5] The Superior Court also treated the Bump-Up Provision as a policy exclusion, *id.* at 2 n.6, even though the Policy does not contain an agreement that the insurer will pay an increase in consideration for an acquisition, *see Vari Builders, Inc. v. United States Fidelity & Guaranty Co.*, 523 A.2d 549, 552 (Del. Super. Ct. 1986) ("[T]he basic principle [is] that exclusion clauses ***subtract*** from [the agreed upon] coverage."). Regardless, the Bump-Up Provision still applies to bar coverage because the Insurers' interpretation is the only reasonable interpretation.

On the third requirement, the Superior Court held that the *Baum* Action settlement did not represent an effective increase in consideration. Ex. B at 23-27. The court held that in determining "what a settlement represents," it can look beyond "the relief sought in the underlying litigation," and consider also "(1) the language of the settlement; (2) indications that the settlement amount represents compensation for an inadequate deal price; (3) the stage of litigation at the time of the settlement; and (4) the composition of the settlement class." *Id.* at 23-24. The court did not cite any authority supporting this four-factor test. *Id*.

As to the first and second factors, the Superior Court found that Harman "expressly denies any wrongdoing and liability" in the *Baum* Action settlement and that Harman's "reason for settling 'was based solely on the conclusion that further conduct of the Litigation would be protracted and expensive . . . and that it would be beneficial to avoid costs, uncertainty, and risks inherent to any litigation, especially in complex cases like this Litigation.'" Ex. B at 24.

As to the third factor, the Superior Court found "the *Baum* Action was still in the early stages of litigation with only minimal discovery completed" and continuing to defend the action would have cost Harman between "$25 to $30 million." Ex. B at 24. The court then engaged in a self-described "speculat[ive]" calculation to determine whether the settlement "adequate[ly]" compensated the class for the alleged inadequate deal price. *Id.* at 25. According to this calculation, the *Baum*

Action alleged Harman should have paid its shareholders $279,534,420 in total for the 69,883,605 shares of Harman stock that were outstanding based on the allegations that the true value of the shares was $116 per share. *Id*. at 25-26. In the Superior Court's view, $28 million "seems grossly inadequate as compensation for an inadequate deal price." *Id.* at 25.

On the fourth factor, the court held "[t]he composition of the *Baum* Action class doesn't support a finding that the settlement represents an effective increase in consideration" because "the settlement class included only former Harman shareholders that held at the time of the merger vote but sold prior to receiving any deal consideration." *Id*. at 26-27.

On February 5, 2025, the Superior Court entered Harman's proposed order of final judgment and prejudgment interest. Ex. A. The Insurers filed timely notices of appeal.

ARGUMENT

I. THE *BAUM* ACTION ALLEGED INADEQUATE CONSIDERATION.

A. Question Presented

Whether the *Baum* Action's request for relief of damages for inadequate deal consideration constituted a "Claim alleging" inadequate consideration under the Bump-Up Provision. (Preserved at A2792.)

B. Scope of Review

This Court reviews the grant of summary judgment and the interpretation of an insurance policy *de novo*. *In re Verizon Ins. Coverage Appeals*, 222 A.3d 566, 572 (Del. 2019).

C. Merits of Argument

The plain language of the Bump-Up Provision requires only a "Claim alleging" inadequate consideration. And there is no doubt the *Baum* Action "alleged" that the "consideration paid" to Harman shareholders was "inadequate." The Superior Court agreed: "The only relief sought in the *Baum* Action was 'the difference between the price Harman shareholders received and Harman's true value at the time of the Acquisition;' one might rightly read that as a request of relief for inadequate consideration." Ex. B at 21-22. Despite this, the court held the Bump-Up Provision applies only to "Claims" where damages for inadequate consideration are a "viable" remedy. *Id.* at 20. This was error.

1. The Bump-Up Provision Requires Only a "Claim Alleging" Inadequate Consideration, Which the *Baum* Action Satisfied.

"The scope of an insurance policy's coverage . . . is prescribed by the language of the policy." *Emmons v. Hartford Underwriters Ins. Co*., 697 A.2d 742, 745 (Del. 1997) (citations omitted). Absent "ambiguity, Delaware courts interpret contract terms according to their plain, ordinary meaning." *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012) (citations omitted); *see O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 288 (Del. 2001) ("The Delaware courts should not 'destroy or twist policy language under the guise of construing it.' 'Creating an ambiguity where none exists could, in effect, create a new contract. . . to which the parties had not assented.'") (citations omitted).

Applying these principles, the Bump-Up Provision requires only that a Claim (i.e., a civil proceeding) "alleg[e]" inadequate consideration:

> In the event of a **Claim** ***alleging*** that ***the price or consideration*** paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all the ownership interest in or assets of an entity ***is inadequate*** . . . .

A3417, 3421-22 (emphasis added).

Because the Policy does not define "allege," "inadequate," or "consideration," courts must apply their plain and ordinary meaning. *Alta Berkeley*, 41 A.3d at 385. An "allegation" is merely an assertion "without proof." This term does not carry with it any requirement regarding viability of the allegation. This ordinary reading

of the term is consistent with the Policy itself, which repeatedly distinguishes between "actual ***or*** alleged" matters. A3418, A3426 (defining "Wrongful Act" as certain "actual or alleged" conduct) (emphasis added). "Consideration" means "[s]omething . . . bargained for and received by a promisor from a promisee," and "inadequate" means "not enough or good enough; insufficient."

The *Baum* complaint is replete with allegations reflecting the plaintiff's belief that the price Harman stockholders "received" for the "promise" of their shares was "not enough" and "insufficient" as a result of the purported Section 14(a) violation. A2910-14, A2940-41, A2943, A2945-46, A2950, A2955-56. As the *Baum* court explained, to prevail on a Section 14(a) violation, a plaintiff must establish "that the purported violation caused her injury." A3082. Although the parties in the *Baum* Action disputed whether the plaintiff's theory of injury was viable, all parties agreed on what that theory was: the deal price was insufficient. A3000; A3583. Harman itself conceded that this was the plaintiff's "entire theory of harm." A5099. The decision below acknowledged that "the only relief sought in the *Baum* Action was 'the difference between the price Harman shareholders received and Harman's true value at the time of the Acquisition.'" Ex. B at 21.

2. The Decision Below Erred by Inserting a Viability Requirement into the Bump-Up Provision.

Despite the unambiguous nature of the Bump-Up Provision's language and the *Baum* Action's allegations, the decision below determined it was not enough that the "Claim allege[s]" inadequate consideration. Rather, the Superior Court held that inadequate consideration must also be a "viable cognizable remedy," meaning "the court in the underlying action must also be authorized to remedy the inadequate deal price under the claims made." Ex. B at 20, 22.

a. The Policy's Plain Language Includes No Requirement Regarding the Viability of a Plaintiff's Requested Relief.

The decision below cited no language in the Policy that gives rise to a viability requirement. There is none. Interpreting the Policy provision to create additional requirements that appear nowhere in the Policy was error. *See, e.g.*, *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489, at *6 (Del. Ch.) ("Under Delaware law, courts will not rewrite contracts to read in terms that a sophisticated party could have, but did not, obtain at the bargaining table."); *see also Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) ("[W]e must . . . not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal.").

In cases involving similar bump-up provisions, courts have declined similar invitations to inject terms into those provisions that are not there. *See Joy Global Inc. v. Columbia Casualty Company*, 555 F. Supp. 3d 589, 595 (E.D. Wis. 2021) (declining to "read the relevant exclusion as limited to a claim alleging 'only' that inadequate consideration was paid for an acquisition, despite the word 'only' not appearing in the provision"), *aff'd sub nom. Komatsu Mining Corp*, 58 F.4th 305; *Ceradyne, Inc. v. RLI Ins. Co.*, 2022 WL 16735360, at *10 (C.D. Cal.) ("[T]he Court declines to read in the word 'only' to the Bump-Up Exclusion's unambiguous language."). Notably, *Joy Global* also involved allegations of a Section 14(a) violation premised on inadequate consideration. *See* 555 F. Supp. 3d at 594.

Construing the word "allege" to impose a viability requirement also fails to "read [the Policy] as a whole." *See O'Brien*, 785 A.2d at 291. The term "allege" (and other variants) appear elsewhere in the Policy. For example, the definition of "Securities Claim" itself—the only type of Claim for which Harman itself can be covered under the Policy—includes certain types of Claims "***alleging*** a violation of any law, rule or regulation, whether statutory or common law." A3441. If the word "alleging" imports a viability requirement, Harman would be covered for a Securities Claim only if the underlying claim were viable. *See Skye Min. Invs., LLC v. DXS Cap. (U.S.) Ltd*., 2021 WL 3184591, at *15 (Del. Ch.) ("[T]he court must 'presume the same words used in different parts of a writing have the same

meaning.'") (citation omitted); *Comerica Bank v. Glob. Payments Direct, Inc.*, 2014 WL 3567610, at *11 (Del. Ch.) (rejecting interpretation because "the same phrase should be given the same meaning when it is used in different places in the same contract"). Consequently, if "allege" is interpreted to include a viability element—and, according to the decision below the *Baum* Action did ***not*** allege a viable claim—the *Baum* complaint necessarily did not allege a "Securities Claim" within the meaning of the Policy. In other words, there is no potential for coverage—an absurd result. Interpreting the Bump-Up Provision to impose a viability requirement thus "creates irreconcilable conflicts" with other provisions and must be rejected. *See Comerica*, 2014 WL 3567610, at *8.

Alternatively, to the extent the decision below interpreted the language "represent[s] … [an] effective[] increase" to include a viability requirement, such an interpretation is equally at odds with the plain language of the Provision. Ex. B at 20. The Provision requires a specific order of inquiry: "***In the event of*** a Claim alleging [inadequate consideration], Loss ***with respect to such Claim*** . . . ." A3422. That is, to determine whether the provision applies, first, there has to be a "Claim alleging" inadequate consideration. Only then, "with respect to such Claim," can a court determine whether the loss represents an effective increase in consideration paid. To read a viability requirement into the first prong based on the second subverts the order of the inquiry, resulting in an interpretation that ignores the word "alleging"

and inserts a viability requirement. This is precisely the kind of "twist[ing] of policy language under the guise of construing it" that Delaware courts should not do. *See O'Brien*, 785 A.2d at 288.

b. There Is No Authority To Support the Imposition of This Extra Element.

Beyond lacking any Policy language to support its conclusion, the ruling below also lacks any supporting legal authority. Ex. B at 20-22. In denying Harman's first summary judgment motion in this case, the Superior Court itself made no mention of a viability requirement in applying the Bump-Up Provision. *See* Ex. C at 21-22. Nor did the court identify a viability requirement in its decision in a different bump-up case based on the same policy language. *Id.* at 22. Thus, even under the Superior Court's own prior decisions, there is no viability requirement.

Outside of Delaware, courts have similarly declined to recognize a viability requirement in their coverage analysis. When expressly invited to do so, the Seventh Circuit unequivocally rejected the invitation. In *Komatsu*, the plaintiff alleged a Section 14(a) violation based on allegations that fraudulent proxy statements "induced shareholders to vote in favor of a merger whose price was not as advantageous as it could have been." *Komatsu Mining Corp.*, 58 F.4th at 308. Komatsu Mining argued that the bump-up provision did not apply because the plaintiff could not prevail on a Section 14(a) violation based on inadequate

consideration. The Seventh Circuit, like the Superior Court here, questioned whether the plaintiffs in the underlying litigation ultimately could have been successful, i.e., whether their claim was ***viable***. Although the Seventh Circuit acknowledged the possibility that the complaints may not have adequately pled violations of federal securities laws, the court nonetheless determined that such an inquiry was ***not relevant*** to whether the settlement fell within the insurance policy's bump-up provision, stating, "[s]till, ***the settlement stands*** whether or not the complaints came within §14. We consider only whether the $21 million is a loss covered by insurance." *Id.* at 307 (emphasis added). The Seventh Circuit proceeded to conclude that, based on the relevant policy language, the underlying settlement was a claim alleging inadequate consideration because "the loss from any legal wrong depended on a conclusion that the price offered in the merger was too low." *Id.* at 308. Thus, in addressing insurance coverage for a settlement which "stands" on the facts and events that existed at the time of the settlement, the Seventh Circuit reached the opposite conclusion from the decision below.

The court in *Towers Watson*, in a hearing, likewise questioned the viability of a Section 14(a) violation based on inadequate consideration. A1066. Ultimately, however, the court held viability did not matter. Because the bump-up provision "reaches any amounts 'representing' that which 'effectively increase[s],' . . . the consideration paid for the merger," "[t]he focus is therefore on the overall result—

whether, at the end of the day, the former . . . shareholders were paid additional monies because the amount they received in the merger was inadequate." *Towers Watson & Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2024 WL 993871, at *8 (E.D. Va.).

Instead, consistent with the language in this Bump-Up Provision and similar ones, all relevant decisions have looked only to whether the underlying complaint ***alleged*** inadequate consideration. *See Towers Watson*, 2024 WL 993871, at *5 ("Because the allegations of inadequate consideration here were the basis for the harms underlying the Section 14(a) and fiduciary claims, the Actions necessarily 'alleged' inadequate consideration, thus invoking the Exclusion."); *Joy Global*, 555 F. Supp. at 594 ("Each settlement resolved the entire suit or suits at issue and each cause of action within the suits relied on the allegations of inadequate consideration, so in each case the part of the Claim which was settled alleged inadequate consideration."); *Komatsu Mining*, 58 F.4th at 308 (affirming *Joy Global*) ("By concealing information, the complaints maintained, the proxy statements induced shareholders to vote in favor of a merger whose price was not as advantageous as it could have been. That's an 'inadequate consideration claim' under this policy's definition.").

In sum, none of the relevant authority supports the unprecedented insertion of a viability requirement in the Bump-Up Provision.

3. The Decision Below Improperly Substituted the *Baum* Court's Judgment on Viability of the Plaintiff's Section 14(a) Allegations With Its Own.

Relying on its own assessment of viability, the Superior Court concluded that "there is substantial doubt" the *Baum* court was "authorized to remedy the inadequate deal price under the claims raised" in the *Baum* Action. Ex. B at 22. In this regard, the Superior Court circumvented the *Baum* court's ***two*** rulings that the *Baum* Action adequately pled loss causation based on a damages theory of inadequate consideration.

a. The Law of the *Baum* Action: The *Baum* Court Ruled Twice That the *Baum* Plaintiff's Theory of Loss Causation—Inadequate Consideration—Was Viable.

In denying Harman's motion to dismiss, the *Baum* court concluded that the "plaintiff has adequately pled loss causation by asserting that Harman shareholders did not receive adequate compensation in the acquisition." A3040. The *Baum* court reaffirmed this ruling in its decision denying Harman's motion for judgment on the pleadings. *Baum*, 575 F. Supp. 3d at 293, 298-301. The court specifically addressed whether the plaintiff's damages theory supported her allegations of a Section 14(a) violation. It rejected Harman's argument that the plaintiff failed to state a Section 14(a) violation "because her theory of economic loss rests on allegations concerning the inherent value of her Harman shares at the time of the merger," and instead, agreed with the plaintiff, that the relevant inquiry was whether the plaintiff's

allegations were sufficient to plead a non-speculative violation. *Id.* at 293. Concluding that the "plaintiff's allegations provide a sufficient basis for pleading a non-speculative claim," the *Baum* court found she adequately pled loss causation. *Id.* at 300.

These rulings were the "law of the case" when the *Baum* parties—including Harman—negotiated and agreed to their settlement. *See Nationwide Emerging Managers, LLC v. NorthPointe Holdings, LLC*, 112 A.3d 878, 894-95 (Del. 2015) ("Under 'the law of the case doctrine,' a court's legal ruling at an earlier stage of proceedings controls later stages of those proceedings, provided the facts underlying the ruling do not change."). In fact, the parties reached their agreement just months after the *Baum* court issued its second ruling. The rulings were also the governing law of the case when the parties sought approval of the settlement and when that court granted its approval. Harman could have chosen to litigate further (with its defense costs paid for by its insurers), but it did not. Its choice to settle is inextricably tied to these rulings. In assessing coverage for a settlement, Delaware courts look to the facts that existed at the time of the settlement. *Premcor Ref. Grp., Inc. v. Matrix Serv. Indus. Contractors, Inc.*, 2013 WL 6113606, at *5 (Del. Super.) ("When reviewing a duty to indemnify under a settlement, the Court must look at the facts as established in pre-trial discovery before the settlement."). These two rulings

formed part of the set of facts that existed prior to the settlement. The Superior Court's decision on viability, years after the settlement was approved, did not.

b. The Decision Below Ignored the Law of the Case in the *Baum* Action.

In disagreeing with the *Baum* court's rulings, the Superior Court effectively took on an appellate role that it does not have on an issue of federal law over which it lacks jurisdiction. In a footnote, the Superior Court attempted to reconcile its ruling with the federal court's rulings in the *Baum* Action, suggesting the *Baum* court did not decide that "inadequate consideration *was* sufficient to give rise to liability," but rather only that "loss causation was adequately alleged because '[t]he lower price paid to shareholders, plaintiff alleges, is a result of material omissions or false statements that justified the production of a weaker set of projections.'" Ex. B at 22 n.95.

The Superior Court's recognition that inadequate consideration was expressly alleged puts the settlement squarely within the Bump-Up Provision. And, to the extent the Superior Court was attempting to draw a distinction between a ruling on "liability" and sufficiency of the allegations, such a distinction finds no support in the record. Ex. B at 22 n.95. At the motion to dismiss stage, Harman advanced multiple arguments in favor of dismissing the *Baum* complaint, one of which was failure to sufficiently allege loss causation. *See generally* A3550-51. Only by

rejecting all of Harman's arguments—including that loss causation was inadequately pled—could the *Baum* court decide, as it did, that "Plaintiff's claims . . . may proceed under Sections 14(a) and 20(a) of the Securities Exchange Act." A3086. The import of the federal court's rulings is plain—because the plaintiff's allegations were viable, the defendants might be liable if the allegations were proven. The Superior Court's decision facially conflicts with the *Baum* court's rulings. And the Superior Court acknowledged as much by expressly "doubt[ing]" the correctness of the federal court. Ex. B at 22.

The viability of the *Baum* plaintiff's allegations of a Section 14(a) violation under the federal Securities Exchange Act was decided, twice, by the presiding federal court. The Superior Court's disagreement with that decision and its substitution of its own judgment long after the settlement was reached were erroneous. The circumstances of the federal court's rulings which existed at the time the parties settled cannot be undone years later. The *Baum* Action settlement "stands whether or not the complaint[] came within § 14." *See Komatsu*, 58 F.4th at 307.

4. <u>The Decision Below Would Lead to Absurd Results.</u>

If allowed to stand, the decision below will lead to absurd results. *See Manti Holdings, LLC v. Authentix Acquisition Co.*, 261 A.3d 1199, 1208 (Del. 2021) ("An interpretation is unreasonable if it produces an absurd result or a result that no reasonable person would have accepted when entering the contract.") (quotations

and citations omitted). According to the Superior Court, Delaware courts presiding over insurance disputes should review other courts' decisions in underlying cases to determine whether they were correct—effectively forcing Delaware courts to act as appellate courts in reviewing earlier decisions—including those of federal courts on federal securities law. This violates both principles of comity and Delaware's strong public policy of "staying in its own lane" when it comes to federal securities law. *See Van de Walle v. Salomon Bros.*, 1997 WL 633288, at *4 (Del. Ch.) ("Principles of comity suggest that state courts should defer to the decisions of federal courts when those courts construe federal statutes."); *Thomas & Agnes Carvel Found. v. Carvel*, 2008 WL 4482703, at *8 (Del. Ch.), *aff'd*, 970 A.2d 256 (Del. 2009); Myron T. Steele, *Sarbanes-Oxley: The Delaware Perspective*, 52 N.Y.L. Sch. L. Rev. 503, 506 (2008).

II. THE *BAUM* ACTION SETTLEMENT REPRESENTS AN EFFECTIVE INCREASE IN CONSIDERATION.

A. Question Presented

Whether the *Baum* Action settlement represents an effective increase in consideration. (Preserved at A2795.)

B. Scope of Review

The applicable scope of review is set forth in Argument I.B, *supra*.

C. Merits of Argument

The Bump-Up Provision broadly extends to "any amount" "representing" an "effective[] increase[]" of the consideration paid for the acquisition.[6] The controlling inquiry is therefore directed to the overall result—what does the settlement represent? Based on the "the underlying complaint, settlement, and supporting materials," which must be considered when evaluating indemnity coverage for a settlement, *Goodge v. Nationwide Mut. Fire Ins. Co.*, 2015 WL 5138240, at *2 (Del. Super.), the *Baum* Action settlement represents an effective increase in the consideration paid to Harman's shareholders. Not only was this the only theory of loss the *Baum* plaintiff pled, but also the settlement itself confirms that it represents a bump-up in consideration by requiring the settlement amount to be disbursed to

[6] As discussed in note 5, *supra*, Appellants do not agree that the Bump-Up Provision is an exclusion.

the class on a pro rata, per share basis. Furthermore, the materials submitted to the *Baum* court in support of the settlement evaluated the settlement's fairness, adequacy, and reasonableness in terms of deal price.

1. The *Baum* Action Settlement Represents an Effective Increase in the Per Share Price Paid to Harman Shareholders for Harman's Acquisition.

The Bump-Up Provision applies if the settlement amount "represents" an "effective increase" in the consideration paid for a corporate transaction, so long as it is "with respect to" "a Claim alleging" inadequate consideration. A3422. The term "effectively" is "used when you describe what the real result of a situation is"; and "represent" is defined as "to serve as a sign or symbol of" or "to correspond to in essence."[7] *See Alta Berkeley*, 41 A.3d at 385 (requiring courts to "interpret contract terms according to their plain, ordinary meaning"). To give effect to these words, therefore, the controlling inquiry must be directed to the overall result and the allegations resolved by the settlement: Will the former Harman shareholders receive any additional money because of the *Baum* Action? The answer is decidedly yes.

The ***only*** allegations of harm at issue in the *Baum* Action were that Harman shareholders received less from Samsung's acquisition than they were owed. A2955-

[7] *Effectively*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/learner-english/effectively; *Represent*, Merriam-Webster, https://www.merriamwebster.com/dictionary/represent.

56; A3000; A3022-23. Thus, the entire *Baum* Action settlement amount necessarily represents additional consideration that "effectively increases" the amount paid for the acquisition. Again, it matters not whether the allegations that the settlement resolves are "viable."

Other courts interpreting bump-up provisions agree. In *Towers Watson*, the court determined that the dispositive question for purposes of determining what the settlement "represents" is "whether, at the end of the day, the former Towers Watson shareholders were paid additional monies because the amount they received in the merger was inadequate." *Towers Watson*, 2024 WL 993871, at *8. Based on nearly identical allegations, the *Towers Watson* court concluded that settlement did just that because the "allegations of harm were solely predicated on the theory that shareholders got less in the merger than Towers Watson was worth." *Id.* In sum, "after giving all the words in the [bump-up provision] their reasonable and ordinary meaning, the [c]ourt conclude[d] that the Settlements 'represent' amounts that 'effectively increased' the consideration for the merger, such that the [bump-up provision] unambiguously applies to the Settlements." *Id.* at *9.

Joy Global reached the same conclusion. There, the court held that the settlements represented an effective increase in consideration because "each complaint alleged that the price proposed to be paid for an acquisition transaction was inadequate" and "[e]ach settlement resolved the entire suit or suits at issue,"

meaning that "in each case part of the Claim which was settled alleged inadequate consideration." *Joy Global*, 555 F. Supp. 3d at 594.

Moreover, the discovery in the *Baum* Action, the language of the *Baum* Action settlement, and materials supporting the settlement confirmed that the settlement was an "effective increase" in "consideration paid" to Harman shareholders. *See Goodge*, 2015 WL 5138240, at *2-3; *Premcor*, 2013 WL 6113606, at *5.

First, as set forth in the Stipulation of Settlement itself, the parties to the settlement expressly "intend[ed] this Settlement to be a final and complete resolution of all disputes between them with respect to the Litigation [the *Baum* Action]." A2254. Thus, there is no doubt the purpose of the *Baum* Action settlement was to resolve the allegations in the *Baum* Action.

Second, when asked to identify in an interrogatory "each category of damages" sustained as a result of the conduct alleged in the complaint, the plaintiff in *Baum* identified only one: the "'measure of damages' in this case 'compares the value of what the plaintiff received and the fair value of their shares.'" A3022-23.

Third, in seeking final approval of the settlement, the plaintiff's counsel testified regarding the "possible range of recovery" for the class with reference only to the "fair value of Harman's stock" "less the $112.00 per share" that the shareholders received through the acquisition. A3107. The Plan of Distribution directed a pro rata distribution of the settlement funds based on shares, i.e. "[i]f 100%

of shares outstanding on the record date submit a claim, each share's average distribution under the Settlement will be approximately $0.40 per share . . . ." A2283. Thus, the settling parties intended each shareholder to receive additional compensation per share.

Finally, the notice to class members made clear the *Baum* plaintiff's view of the settlement:

> Lead Plaintiff agreed to the Settlement in order to ensure that Class Members will receive ***compensation***, and because Lead Plaintiff (advised by Lead Counsel) considered the Settlement Amount to be a favorable recovery compared to the risk-adjusted possibility of recovery after trial and any appeals . . . .

A2281. Thus, with regards to the shareholders, the settlement represents "compensation" to the class for its injury, which, according to the plaintiff and her counsel, was inadequate deal consideration.

2. The Decision Below Disregarded the Controlling Inquiry: What Does the Settlement Represent?

In determining whether the *Baum* Action settlement represents an effective increase in the consideration Samsung paid, the Superior Court erroneously disregarded this evidence and instead looked to whether the settlement was "for the actual purpose of 'bumping up' the value of the deal." Ex. B at 23. But the Bump-Up Provision is not so limited. As the *Towers Watson* court held in interpreting an identical clause, the provision reaches any amounts "representing" that which

"effectively increase[s]" the consideration paid for the acquisition, so long as it is "with respect to" "a Claim alleging . . . inadequate consideration." *Towers Watson*, 2024 WL 993871, at *8.

Here, the Superior Court never considered the allegations that the *Baum* Action settlement resolved. It offered no explanation for its decisions to disregard the *Baum* complaint and to depart from the other bump-up decisions nationwide.

3. The Decision Below Ignored Critical Evidence of What the Settlement Amount Represents to the Class.

In addition, the Superior Court did not consider the relevant evidence for determining whether an insurance policy covers a settlement, including the "complaint, settlement, and supporting materials." *See Goodge*, 2015 WL 5138240, at *2; *Premcor*, 2013 WL 6113606, at *5.

Instead, the analysis in the decision below focused only on evidence of how Harman itself benefitted from the settlement—which reflected ***why*** Harman settled, but not ***what*** the *Baum* Action settlement represents. Because the benefits to Harman are the same as the benefits to ***any*** defendant who enters into a settlement, by definition, they cannot be what the particular settlement amount in question "represents."

In particular, the decision narrowly focused on Harman's unilateral and self-serving assertions (in the settlement section entitled "Defendants' Denials of

Wrongdoing and Liability"), noting that Harman denied wrongdoing, had represented that it settled only to avoid the costs of protracted litigation, [redacted] Ex. B at 24-25; A2230. [redacted]

First, just as the *Baum* Defendants denied wrongdoing, the Lead Plaintiff and Lead Counsel asserted in the Stipulation of Settlement their "belie[f] that the claims asserted in the Litigation have merit and that the evidence developed to date supports those claims." A2230. The court charged with approving a settlement, however, must ignore these statements to find a settlement is fair, reasonable, and adequate, as the *Baum* court here did. A2692.

Second, the Policy provides certain coverage for Wrongful Acts which are "actual or alleged." A3426. If a denial of liability extinguishes a complaint's allegations of wrongdoing as the court suggested by ignoring the complaint's allegations, there would be no coverage since there would be no settlement payment for "actual or alleged" Wrongful Acts.

Third, a defendant's ability to maintain its denial of wrongdoing [redacted] are inherent benefits to any settling defendant. Because every trial costs money and a class action settlement would rarely include an admission of

liability, the approach of the decision below would render the Bump-Up Provision meaningless—effectively requiring insurers to bear the transaction costs of corporate acquisitions whenever there are legal challenges to the price paid. *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 927 (Del. 2017) ("The basic business relationship between parties must be understood to give sensible life to any contract."). Doing so contravenes the fundamental principle that contracts should be interpreted to "give each provision and term effect, so as not to render any part of the contract mere surplusage." *United States ex rel. JKJ P'ship 2011 LLP v. Sanofi-Aventis U.S. LLC*, 226 A.3d 1117, 1129 (Del. 2020) (quotations and citations omitted).

The Superior Court should have focused instead on the ***joint*** statement of the parties regarding their intent in settling the case: "to be a final and complete resolution of all disputes between them." A2254. As discussed above, the best evidence of the "dispute between" the parties is the complaint. The record reflects no evidence of a dispute between the parties regarding Harman's legal right to deny liability. [redacted]. An insured's own motivations to settle—[redacted]—is not the dispute between the parties which a settlement resolves and thus, is not what the *Baum* Action settlement represents.

4. The Decision Below Misapprehended the Composition of the Settlement Class.

The ruling below relied on an inaccurate definition of the settlement class. In concluding that the class definition did not support the application of the Bump-up Provision, the court erroneously stated that "the settlement class included ***only*** former Harman shareholders that held at the time of the merger vote but sold prior to receiving any deal consideration." Ex. B at 26-27. However, the settlement class included shareholders who did hold shares when the deal closed. A2232. Thus, the court's conclusion that all of the shareholders were "only indirectly impacted by the inadequate consideration" was based on a mistaken factual predicate.

In any event, nothing about the actual class definition suggests the settlement amount represented anything other than an effective increase in consideration. The settlement class included "all Persons who purchased, sold, or held Harman common stock at any time during the period from and including January 10, 2017, the record date, through and including March 12, 2017, the date the Merger closed." A2232. The ***possibility*** that ***some*** class members sold their shares before the deal closed does not alter the meaning of the settlement. To the extent any former shareholders sold their shares after the vote but before the closing, the inadequacy of the announced deal price would have similarly impacted those sales. This is because proceeds from a settlement run with the shares: when stockholders challenge the fairness of a

corporate transaction, the class ordinarily includes anyone who held shares between the date of the transaction's announcement and the closing. However, stock is freely tradeable and "it is unavoidable that persons who sever their economic relationship with the corporation . . . will not benefit from a settlement or a judgment in favor of the class." *In re Prodigy Commc'ns Corp. S'holders Litig*., 2002 WL 1767543, at *4 (Del. Ch.). Selling stockholders make a "conscious business decision to sell their shares into a market that implicitly reflect[s] the value of the pending and any prospective lawsuits" challenging the transaction. *In re Resorts Int'l S'holders Litig*., 1988 WL 92749, at *10 (Del. Ch.). Those who choose to sell their claims are thus compensated at the time of the sale and the benefit from the settlement is accordingly realized by the buyer. *Id.*

5. The Speculative Valuation in the Decision Below Is Not Relevant.

Finally, the decision below concluded that because the ultimate settlement amount in the *Baum* Action was only a small fraction (10%) of the plaintiff's total claimed damages, it was "grossly inadequate" and therefore could not possibly represent an increase in consideration. This conclusion was unsupported factually and wrong as a matter of law.

The percentage of total claimed damages that a plaintiff can achieve through settlement has no bearing on whether the settlement amount represents a bump-up

in consideration. The Provision requires only an "effective[] increase[]" in consideration, not that the effective increase provide full or complete compensation for the injury alleged. A3422. Further, the settlement figure may or may not correspond to the strength of the parties' claims and defenses and potential exposure at trial. What a settlement "represents" is based on the allegations of injury that it resolves. The percentage of total claimed damages is irrelevant.

Even assuming the percentage is relevant, the Superior Court cited no evidence to support its opinion that the settlement amount was "grossly inadequate." Ex. B at 25. The record evidence establishes the opposite. Specifically, the *Baum* Stipulation of Settlement provides that:

> Lead Plaintiff and Lead Counsel believe that the Settlement set forth in this Stipulation confers substantial benefits upon the Class[,] . . . is in the best interests of the Class, and that the Settlement provided for herein is fair, reasonable, and adequate.

A2231.

As the Superior Court recognized, "the *Baum* Action was still in the early stages of litigation with only minimal discovery completed." Ex. B at 24. And counsel for the *Baum* plaintiff testified that "there were numerous uncertainties if the case proceeded to summary judgment, trial, and potential further appeals." A3090, A3102-03.

Against that uncertainty, counsel testified that the $28 million recovery was, in context, a comparatively large settlement:

> Lead Counsel are aware of only one other case since at least 2016, in any jurisdiction, where plaintiffs obtained a monetary recovery greater than $28 million on a pure §14(a) negligence claim challenging a merger proxy (with no open market securities fraud component). Lead Counsel also believe that this $28 million Settlement is the largest §14(a) post-merger common fund recovery in the history of the District of Connecticut.

A3090.

Counsel also provided a prolific study of merger-related lawsuits from the relevant time period which found that "only six such cases resulted in any monetary recovery for stockholders," and of those six, "only one, *Hot Topic*, arose in federal court on a § 14(a) proxy claim." A3090-91, A3127. The study reports that *Hot Topic* settled for $14.9 million, roughly half the $28 million settlement in this case. A3127. In short, the Superior Court's view that the settlement amount was "grossly inadequate" is contradicted by the undisputed record evidence. The Superior Court's conclusion, ultimately, is contrary to the *Baum* court's own assessment and approval of the settlement as being "fair, reasonable, and ***adequate***." A2692 (emphasis added).

CONCLUSION

The judgment below should be reversed.

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CERTIFICATE OF SERVICE

Aaron M. Nelson, Esquire, hereby certifies that, on April 11, 2025, the foregoing Public Version of Opening Brief of Appellants Illinois National Insurance Company and Federal Insurance Company was served on all counsel of record electronically.

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