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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ILLINOIS NATIONAL INSURANCE COMPANY and FEDERAL INSURANCE COMPANY, Defendants-Below, Appellants, v. HARMAN INTERNATIONAL INDUSTRIES, INCORPORATED, Plaintiff-Below, Appellee.	Case No. 47,2025 Court Below – Superior Court of the State of Delaware C.A. No. N22C-05-098-PRW (CCLD) **PUBLIC VERSION**

APPELLEE HARMAN INTERNATIONAL INDUSTRIES, INCORPORATED'S ANSWERING BRIEF ON APPEAL

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NATURE OF THE PROCEEDINGS

This appeal arises out of Harman International Industries, Inc.'s ("Harman") entitlement to insurance coverage for a settlement of shareholder M&A litigation under directors and officers ("D&O") insurance policies. Appellants ("Insurers")[1] refused to cover the settlement based on a provision in the policies known as a "bump-up" exclusion (the "Exclusion"). This type of exclusion is common in D&O policies and has been understood for decades to serve only a narrow purpose—preventing companies from using insurance to subsidize underpriced corporate transactions (*i.e.*, to bump up the purchase price). The classic application of the Exclusion is to the settlement of certain state-law appraisal or quasi-appraisal actions, where the plaintiff seeks and the policyholder actually pays amounts representing increased deal consideration. However, as post-transaction litigation has grown more prevalent and varied, so too has insurers' ingenuity in trying to protect their bottom line. Thus, they have sought to expand the Exclusion far beyond its plain terms to claims, such as this one, where law and indisputable facts plainly establish that the settlement did not represent an increase in deal consideration. If that effort succeeds, it would result in a drastic restriction on bargained-for and

[1] Insurers are Illinois National Insurance Company ("AIG") and Federal Insurance Company ("Federal").

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reasonably expected D&O coverage for Delaware entities and their D&Os just when they need it most.

The D&O policies at issue here expressly cover the defense *and settlement* of lawsuits alleging corporate wrongdoing, including in the context of corporate mergers and acquisitions. In 2015, Harman faced just such a lawsuit—a federal securities class action alleging that Harman's D&Os committed proxy violations under §§14(a) and 20 of the Exchange Act in the context of Harman's 2015 merger with Samsung (the "Baum Action"). But when Harman sought coverage for its $28 million settlement of the Baum Action (the "Settlement"), Insurers invoked the Exclusion, which bars coverage for a settlement or judgment (but not defense costs) if (1) a Claim alleges the receipt of inadequate deal consideration, *and* (2) the settlement or judgment in fact "represents" an effective increase in that deal consideration to shareholders. As the Superior Court recognized, a host of uncontroverted evidence and clear-cut federal law show that the $28 million Settlement of the Baum Action did *not* represent such an increase. The Settlement instead represented an agreement to resolve risks unrelated to deal consideration and Harman's desire to settle for less than the anticipated cost of defense.

Insurers do not (and cannot) dispute federal law holding that claims for damages representing an increase in deal consideration are not viable under §§14(a) and 20 of the Exchange Act. Nor do they dispute that it would have been impossible

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for the Baum Action plaintiff class to ultimately secure damages representing such an increase. Notably, Harman was seeking leave to file an interlocutory appeal on that basis in the Baum Action at the time of the Settlement. Nevertheless, because the Baum Action was in its infancy, Harman recognized that, despite the strength of its appeal, it would *still* face risks of damages unrelated to the adequacy of the deal consideration, including in connection with allegations that Harman's then-CEO was improperly compensated to the tune of approximately $50 million.

So, Harman agreed to settle for $28 million—less than the estimated litigation defense costs if the matter did not settle. Indeed, Insurers fail to mention, let alone dispute, unrebutted testimony from Harman's former general counsel, who managed the litigation and Settlement, that Harman did not perceive *any* risk that it would have to pay an amount representing an increase in deal consideration, and that it *did not* pay any such amount in the Settlement.

[redacted]

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[redacted] In addition, the plaintiff's notice to recovering class members does not once describe the Settlement as resolving an inadequate consideration claim, let alone representing an increase in deal consideration. Even Insurers admitted that this notice "steered" the Settlement *away* from bump-up relief.

Moreover, unlike in a state-law claim involving an alleged breach of fiduciary duty, where class eligibility is conditioned on the receipt of consideration in the transaction, the recovering settlement class proposed *by the plaintiff* in the Baum Action was comprised of shareholders who held shares *on the record date*, even if they then sold their shares before the Transaction closed. Thus, the settlement class included shareholders who did not receive any deal consideration in the first place that could be effectively "increased." This reality underscores that the adequacy of the deal consideration was *irrelevant* to the settlement amount.

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At bottom, given the record evidence and applicable law, the Superior Court correctly held that the Insurers could not carry their heavy burden to establish that the Exclusion bars coverage for the Settlement. This Court should affirm.

ANSWER TO SUMMARY OF ARGUMENT

Insurers bear a heavy burden to establish that the Settlement represents an effective increase in deal consideration. The Superior Court correctly concluded that Insurers failed to do so. Insurers dispute that conclusion based on an incorrect interpretation of the Superior Court's decision, and their arguments otherwise ignore or twist the law and record.

1. Denied. Insurers principally assert that the Superior Court erred in concluding that the Baum Action did not include a Claim alleging the receipt of inadequate deal consideration because such a Claim is not viable under §14(a). That argument incorrectly interprets the decision below. The court concluded that whether the plaintiff had a viable remedy for increased deal consideration under federal law served as a "meaningful informant" of whether the amount paid by Harman to settle the Baum Action actually "represented" an increase in deal consideration. What the Settlement "represented" is a separate element of the Exclusion, and for the reasons provided below, the court correctly determined that the Settlement here did not represent an increase in deal consideration.

In all events, the Baum Action did not qualify as a Claim alleging the receipt of inadequate deal consideration. Delaware law is clear that a Claim "alleges" a particular fact or circumstance within the meaning of an insurance policy exclusion only if that fact or circumstance is meaningfully linked to the viability of the Claim.

[redacted]

That link did not exist in the Baum Action. Insurers do not dispute that, under clear-cut federal law, the Baum Action plaintiff could never have secured an increase in deal consideration as damages because that is not a viable remedy for a §14(a) claim. Insurers' contrary arguments ignore that Delaware law mandates that coverage *grants* be read broadly and *exclusions* narrowly—and, thus, that interpreting the word "alleging" differently depending on whether a particular provision grants or restricts coverage is not only appropriate, but *required.*

2. Denied. The Superior Court correctly held that the Settlement did not represent an effective increase in deal consideration, including because (1) an increase in deal consideration is not a viable remedy under §14(a), (2) the settlement class, settlement amount, settlement documents and other record evidence show that the amount paid did not represent such an increase, and (3) the settlement was less than the cost of defense (which is expressly carved out of the Exclusion).

Insurers' contrary arguments rewrite the Exclusion in hindsight and ignore and/or wrongly characterize the record and the law. **First**, Insurers assert (at 5) that "the plain language of the Bump-Up Provision … focuses inquiry on the allegations the settlement resolves." But the Exclusion does the opposite. Unlike other exclusions in the policy (and unlike other bump-up exclusions available in the insurance marketplace), the Exclusion does not bar coverage for a particular type of *Claim*. Rather, in the event of a particular Claim, it bars coverage only for the

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"amount" of *Loss* that represents an increase in deal consideration. This tracks Delaware law regarding the duty to indemnify, which (unlike the duty to defend) turns on the actual record facts, not the complaint's allegations.

Second, Insurers' argument that the only relief the plaintiff sought in the Baum Action was an increase in deal consideration is false. The Baum Action settled in an early stage of litigation for less than the estimated cost of defense before the parties conducted any meaningful discovery or the plaintiff had formalized her damages theory. Even at that early stage, indisputable record evidence shows that, absent settlement, the plaintiff would have asserted damages theories unrelated to the adequacy of the deal price, including based on allegations in the complaint.

Thus, at the time of settlement, and despite undisputed evidence that Harman did not perceive any risk that it would *ever* have to pay "bump-up" damages, Harman faced a material risk of monetary harm distinct from the adequacy of the deal consideration and exceeding the $28 million settlement offer on the table. Thus, Harman did what any prudent policyholder would do: (1) settled for $28 million with a full denial of liability and a clear representation that the Settlement could not be used as an admission that the Settlement represented an amount the plaintiff could have secured at trial; (2) agreed to a broad settlement class that was not dependent on any shareholder having actually received deal consideration in the transaction in the first place; [redacted]

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COUNTERSTATEMENT OF FACTS

A. The Baum Action

On November 14, 2016, Harman and Samsung announced that they had entered into an Agreement and Plan of Merger with an estimated value of $8 billion to Harman's stockholders (the "Transaction"). A1794; A1805-90. Harman's stockholders voted in favor of the Transaction on February 17, 2017, and the Transaction was completed on March 10, 2017. A1897-98 ¶¶13, 16.

Shareholder litigation quickly followed. This included certain state-law appraisal claims, which Harman resolved in 2017. The shareholder litigation also included the Baum Action, which was *not* an appraisal or quasi-appraisal action. Rather, it was a federal securities class action filed in the U.S. District Court for the District of Connecticut that asserted violations of §§14(a) and 20 of the Exchange Act predicated on alleged proxy violations.

Insurers omit that the original Baum Action complaint, filed in February 2017, asserted not only causes of action under the federal securities laws, but also a separate cause of action for breach of fiduciary duty for "accepting grossly inadequate consideration." A2220-22. But the plaintiff abandoned that cause of action in filing the amended complaint on July 2017, leaving only the federal securities law claim (the "Baum Complaint"). A1938-42.

[redacted]

Insurers contend (at 7-8) that the "sole claim for relief" asserted in the Baum Complaint was "that the price received for Harman stock in connection with its acquisition is insufficient." That is wrong. The Complaint's "Prayer for Relief" sought compensatory and rescissory damages (as well as attorneys' fees) based on *all* allegations in the Baum Complaint. A1942. Those allegations included that the defendants issued a "false and misleading proxy statement in violation" of federal law, and that Harman's then-CEO received approximately $50 million in improper compensation. A2909-10; 2953.

Insurers' description of the remainder of the Baum Action, up to and including the Settlement, suffers from this same selective recall. After hyper-focusing on the *Baum* court's *pre-discovery* ruling that the plaintiff had adequately pled loss causation, they jump directly to the Settlement, ignoring material developments in the ensuing months that inform the meaning and scope of the Settlement. This is significant because nothing in the *Baum* court's pre-discovery decisions regarding the legal sufficiency of the Baum Complaint limited the theories of relief the plaintiff could advance as discovery progressed. The plaintiff herself emphasized this point in her initial interrogatory responses, explaining that "[d]amages are a subject for expert testimony, and it is premature at this stage of the litigation to calculate damages." A3023. The plaintiff thereby afforded herself maximum latitude to assert

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whatever damages theories were supported by discovery, which had yet to commence in earnest.

Moreover, Insurers omit that shortly after the *Baum* court's pre-discovery decisions on the sufficiency of the Baum Complaint, Harman moved for interlocutory appeal of those decisions in the U.S. Court of Appeals for the Second Circuit on the ground that, under clear-cut federal law, §14(a) is not a vehicle for a plaintiff to secure damages based on an inadequately priced transaction, as that is a state law claim. A2329-52.

B. The Baum Action Mediation and Settlement

Although this entire appeal turns on whether the Settlement "represented" a specific and narrow form of relief falling within the Exclusion, Insurers race through their description of the Settlement. That is no accident, as the full story surrounding the Settlement is fatal to their position.

While Harman's motion for interlocutory appeal was threatening plaintiff's inadequate consideration theory, and before discovery had meaningfully commenced, the Baum Action parties appeared at a court-recommended mediation under the auspices of the Honorable Layn Phillips. As is common at mediation, the plaintiff engaged in vigorous chest-pounding, asserting "class-wide damages of $784,067,175" based on Harman's purported "true value" at the time of the Transaction, and demanding $455 million. A2534-35. Harman was unimpressed.

[redacted]

As affirmed by its former general counsel, who managed the litigation and settlement negotiations, "[i]n settling the Baum Action, Harman did not consider that Harman might one day be required to pay damages representing an increase in deal consideration." A1765 ¶5.

[redacted] Whereas the plaintiff's bump-up damages theory had failed to move the needle, the prospect of the plaintiff's alternative damages theories was not legally foreclosed and could not be so casually dismissed.

The reason for this was straightforward. Even if Harman prevailed on its appeal, that success could prove a pyrrhic victory because the Baum Action posed risks of monetary harm untethered to the adequacy of the deal consideration. This included risks based on the alleged *overpayment* of compensation as part of a flawed deal process and because of the financial harm that would result if Harman's D&Os were found to have engaged in proxy violations *even if the deal price was found to be adequate*. A1765 ¶5. Thus, [redacted]

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[redacted] settling was an easy call. But Harman "never understood the Settlement to represent an effective increase in Merger consideration to Harman's former shareholders." A1766 ¶6. On the contrary, it was never seriously concerned about ever having to pay any such amount.

Harman documented this position in the Settlement Agreement, which included a full denial of liability by Harman. A2230 §II; A2253 §IV.8.1. That agreement also explained that the Harman defendants' decision to settle "was based solely on the conclusion that further conduct of the Litigation would be protracted and expensive" and that they wanted to "avoid the costs, uncertainty and risks inherent in any litigation[.]" A2230 §II. And it expressly provided that the settlement "shall not be … construed … as an admission or concession that the consideration to be given … represents the amount which could or would have been recovered after trial." A2254-56 §IV.10.5(d).

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[redacted] Significant record evidence shows that the Baum Action *plaintiff* understood this as well. The settlement class proposed *by the plaintiff* did not require that shareholders receive deal consideration in the transaction to be eligible for recovery. A5593 §IV.1.3; A2282 ¶5. The only requirement was that a class member held shares on the record date. *Id.* This requirement aligned the class with the shareholders who had legal standing to assert a §14(a) claim. A2282 ¶5. And it meant that the settlement class almost certainly included individuals who *did not receive deal consideration at all*. Indeed, despite bearing the burden of proof, Insurers failed to seek any discovery regarding the composition of the settlement class or adduce any evidence that a single recovering shareholder had received deal consideration in the first place. Ex.B at 27 n.109.

[redacted]

Further, although Insurers cite to a snippet from the oral argument transcript regarding settlement approval in the Baum Action, they omit that the plaintiff's counsel made clear, in moving for settlement approval, that counsel's "detailed review and analysis of available facts" resulted in a "strong Amended Complaint, with *multiple* theories for relief." A3095 ¶21 (emphasis added). The plaintiff further explained that the risk posed by Harman's motion for interlocutory appeal, which challenged the viability of the plaintiff's theory predicated on Harman's so-called "true value," was an important motivation for the Settlement. A3102 ¶44. Indeed, plaintiff's counsel explained "there was substantial uncertainty regarding the range of possible damages, as well as any ultimately provable damages." A3107 ¶57. Counsel also underscored that the plaintiff's theory presumed that if full disclosure had been made in the Proxy materials, shareholders would have *voted down* the transaction such that *no consideration* would have been exchanged at all, let alone inadequate consideration. A3101-02 ¶42.

Moreover, the plaintiff sought approval of a notice to recovering class members (the "Class Notice") that described the Baum Action as a Claim seeking damages for alleged proxy violations under §14(a) and made no mention of a claim for increased deal consideration. A2278. Nor did it describe the amount shareholders would receive under the Settlement as such an increase. Notably, AIG did not dispute that the Class Notice undercuts Insurers' position. Rather, the best

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AIG could muster was its "feel[ing]" that this document was "drafted with omissions that may – may steer away from the – the bump-up provision of the policy," a "feeling" for which AIG did not "have any evidence." A5581 at 157:11-158:24. There was an obvious reason for this lack of evidence—the *plaintiff* drafted the notice in the first instance, not Harman. A5582-5619.

Ultimately, Harman agreed to pay $28 million into a "Settlement Fund" that was held in "custodia legis" of the court until such time as the court authorized distribution to class members. A2238-40 §IV.2.1-6; A2270 ¶22. Plaintiff's counsel's fees in the amount of $8,803,809.79, along with taxes and administrative fees were to be taken off the top, and the remainder "Net Settlement Fund" would then be distributed to the class. A2571, A2555; A2244-45 §IV.5.2; A2283-84, A2293.

The court preliminarily approved the Settlement on July 13, 2022, and finally approved the Settlement on November 10, 2022, including granting plaintiff's motion for attorneys' fees. A2582-2688; A2689-97; A2698-2702.

C. Harman's D&O Insurance Program

Before the Transaction with Samsung, Harman purchased a broad D&O insurance program that provides $125 million in coverage, including a $15 million primary policy sold by AIG (the "Primary Policy") and a $15 million first-layer excess policy sold by Federal, which generally follows the Primary Policy's terms

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and conditions (together with the Primary Policy, the "Policies"). A2052-2165; A2166-84.

The Policies broadly cover "Loss," including defense costs and settlements, arising from "Claims," including "Securities Claims," that allege Harman and/or its D&Os engaged in "Wrongful Acts." A2064 §1. Further, the Policies expressly cover such Claims and Losses in the context of common M&A transactions. A2111.

From this broad coverage, the Exclusion narrowly excludes a particular type of Loss:

> 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, 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[.]

A2084-85.

Moreover, Harman's former general counsel, who negotiated and placed the Policies, affirmed that prior to the closing of the Transaction, he notified Insurers of the Transaction and sought to "ensure Harman's access to insurance coverage for lawsuits arising from the [Transaction.]" A1771 ¶8. Therefore, Harman paid $756,564 for a "run-off" endorsement that extended coverage for lawsuits alleging "Wrongful Acts" occurring before the Transaction for a period of six years after the

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Transaction. *Id.* ¶9; A2474-75. At no point did Insurers inform Harman that this coverage would not apply to a settlement of a post-Transaction §14(a) claim, and as Harman's former general counsel that purchased the policy made clear, "nothing in the Policies conveyed this to Harman." A1771 ¶10.

D. The Insurance Dispute

When the Baum Action was first filed, Harman timely sought coverage from Insurers. In a letter dated July 20, 2017, AIG agreed to cover Harman's defense of the Baum Action, recognizing that the Baum Action was a "Securities Claim," and only raised the Policies' "Conduct Exclusion" as a potential bar to coverage for a later indemnity obligation. A2187-88. Federal adopted AIG's coverage denial. A2488-91. Neither Insurer mentioned the Exclusion.

In January 2022, Harman invited Insurers to attend the court-recommended mediation before Judge Phillips. A2229. Harman reasonably expected that Insurers would partner with Harman to try to settle the Baum Action. A1766 ¶7. Mere weeks before the mediation, however, Insurers prospectively denied coverage for *any* settlement of the Baum Action based on the Exclusion. A2485-87.

E. The Superior Court's Decision

The insurance coverage action involved two rounds of dispositive briefing. When Harman first moved for summary judgment pre-discovery regarding the applicability of the Exclusion, the Superior Court found that it had insufficient facts

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to determine what the settlement actually represented: "The Court is being asked at this nascent stage to decide a critical fact—what does the *Baum* settlement actually represent? The *Baum* complaints and the few exhibits included in the record here simply do not provide the Court with enough facts to make those determinations." Ex. C at 25.

Following discovery, the parties filed cross-motions for summary judgment. This time, armed with a full evidentiary record, the Superior Court concluded that "Insurers have not carried their burden of demonstrating that any portion of the [Settlement] falls under the [Exclusion]." Ex. B. at 28.

First, consistent with every court in the country to have addressed an identical or similar exclusion,[2] the court reiterated that the Exclusion was an *exclusion* and, thus, Insurers bore the burden of proof to show that the Exclusion, when strictly and narrowly construed in favor of coverage, specifically, plainly, and conspicuously applied. *Id.* at 12 n.58. Next, the court found that the Transaction was an "acquisition" under the Exclusion. *Id.* at 17-20.

[2] *See, e.g.*, *Northrop Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 347015, at *18-19 (Del. Super. Feb. 2, 2021); *Viacom Inc. v. U.S. Specialty Ins. Co.*, 2023 WL 5224690, at *6 (Del. Super. Aug. 10, 2023); *Joy Global Inc. v. Columbia Cas. Co.*, 555 F. Supp. 3d 589, 594-95 (E.D. Wis. 2021), *aff'd sub nom. Komatsu Mining Corp. v. Columbia Cas. Co.*, 58 F.4th 305 (7th Cir. 2023); *Onyx Pharms., Inc. v. Old Republic Ins. Co.*, 2022 WL 18143421, at *1 (Cal. Super. Ct. Dec. 30, 2022).

[redacted]

The court then turned to whether "any amount of … [the] settlement represent[s] the amount by which [the at-issue transaction] price or consideration is effectively increased" in connection with a Claim alleging the receipt of inadequate deal consideration. *Id.* at 20. In finding that Insurers could not carry their burden, the Superior Court rejected Insurers' position that what the Claim alleged was determinative of what the Loss represented: "To determine what a settlement represents, the Court can't just look to the relief sought in the underlying action; it should look, too, to the record evidence to discern the bases of the settlement." *Id.* at 23. Thus, in Sections 2 and 3 of its decision, the Superior Court considered the applicable law and indisputable record evidence to assess what the Loss represented. *Id.* at 20-28.

The Superior Court correctly concluded that one "meaningful informant" that the Settlement did not represent such an increase was that there was "substantial doubt" as to whether, "in the end, the *Baum* court" was actually authorized to order that remedy. *Id.* at 22. The court further observed that numerous factors, including the Settlement terms, indications in the record of what the Settlement represented, the stage of the litigation, the composition of the settlement class, and the settlement amount, were probative of the what the settlement represented. *Id.* at 23-27. After carefully analyzing these factors, the Superior Court concluded that Insurers could

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not carry their burden to show that the Settlement represented an effective increase in deal consideration. *Id.* at 28. This appeal followed.

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ARGUMENT

I. THE SETTLEMENT DID NOT REPRESENT AN EFFECTIVE INCREASE IN DEAL CONSIDERATION TO SHAREHOLDERS

A. Counterstatement of Question Presented

Did the Superior Court correctly hold that the Insurers failed to carry their burden to show that the Exclusion applies to the Settlement because record evidence and clear-cut federal law established that the Settlement resolved risks and liabilities that do not fall within the Exclusion? A1750-56.

B. Scope of Review

This Court reviews *de novo* the Superior Court's legal determination that an exclusion does not apply. *USAA Cas. Ins. Co. v. Carr*, 225 A.3d 357, 360 (Del. 2020).

C. Merits of Argument

Under Delaware law, where an insured "settles and seeks indemnification, it needs only to show the existence of 'a potential liability on the facts known to [it], culminating in a settlement in an amount reasonable in view of the size of possible recovery and degree of probability of claimant's success against the insured.'" *Premcor Refin. Grp., Inc. v. Matrix Serv. Indus. Contractors, Inc.*, 2013 WL 6113606, at *3 (Del. Super. Nov. 18, 2013). Further, because the Exclusion only concerns the duty to *indemnify* for a settlement or judgment (as opposed to the duty to defend), the applicability of the Exclusion turns not on the pleadings, but on the

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"scope of the record" as a whole. *Am. Ins. Grp. v. Risk Enter. Mgmt., Ltd.*, 761 A.2d 826, 829 (Del. 2000) (finding "[t]he scope of the record is particularly relevant to an evaluation of [insurer]'s…duty to indemnify").[3]

These principles are built into the Exclusion itself, which not only requires a Claim alleging the receipt of inadequate deal consideration, *but also* that the particular amount of loss for which coverage is sought "represent[s] the amount by which such price or consideration is effectively increased." The phrase "such consideration" refers to the consideration paid to shareholders in the transaction. And Insurers concede (at 33 n.7) that the terms "representing" and "effectively" mean that the Settlement must "symbolize" such an increase, as opposed to some other measure of monetary harm. In fact, Insurers admitted below that the Exclusion would not apply if the Settlement was "reasonably tied" to something other than an increase in deal consideration. A5579 at 146:2-10. Thus, to prevail on this element of the Exclusion, Insurers must establish that based on all the record evidence, including the information known to Harman at the time of Settlement, the *entirety*

[3] Insurers assert in a footnote (at 15 n.5) that the Exclusion is *not* an exclusion. But every court in the country to have interpreted a bump-up provision—including every case cited in Insurers' brief—has construed this provision as an *exclusion*. That is because the effect of the Exclusion is to bar coverage for a particular type of Loss otherwise covered, irrespective of its placement in the Policies. *See, e.g., J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 37 N.Y.3d 552, 562 (2021).

[redacted]

of the Settlement symbolized increased deal consideration to shareholders and was not "reasonably tied" to some other harm or consideration. *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 906 (Del. 2021) ("[A]n insurer's burden is to establish that a claim is specifically excluded."). As the Superior Court recognized, Insurers cannot carry this heavy burden.[4]

1. The Baum Action Filings Show That the Settlement Did Not Represent an Effective Increase in Deal Consideration

The premise of Insurers' argument is that the *only* relief the Baum Action plaintiff sought was increased deal consideration, such that any settlement of that action necessarily represents an effective increase in deal consideration. As the Superior Court recognized, this approach ignores that under the plain terms of the Exclusion and clear-cut Delaware law, it is insufficient for a Claim to allege the receipt of inadequate deal consideration; rather, *the loss* must also represent an increase in that consideration based on the record evidence. Here, indisputable record evidence shows that the Baum Action also posed risks unrelated to the adequacy of the deal price, and that the Settlement had nothing to do with the adequacy of the deal consideration.

[4] Section II addresses the Exclusion's separate requirement that a Claim "allege" the receipt of inadequate deal consideration.

[redacted]

i. The Settlement Class

It is indisputable that the composition of the settlement class proposed *by the plaintiff* did not require that recovering shareholders hold their shares until the deal closed and deal consideration was exchanged. This makes sense given that the core of the plaintiff's §14(a) claim was that shareholders were deprived of the ability to cast an informed vote on the Transaction due to Harman's alleged proxy violations, and that if they had accurate information, they would have voted *against* the Transaction. A1924 ¶75; A1939-40 ¶120. Thus, the settlement class reflected that what made the Baum Action actionable was the ability to cast an informed vote on the Transaction on the record date rather than the adequacy of the deal consideration on the closing date.

Notably, despite bearing the burden of proof, Insurers failed to adduce any evidence that even a single recovering class member received deal consideration under the Settlement that could be subject to an effective increase. This is in stark contrast to the settlement class in a state law breach of fiduciary duty claim, where the receipt of deal consideration is a *prerequisite* to participation in the settlement class.[5]

[5] *Compare* A2708 (settlement class in breach of fiduciary duty case alleging inadequate consideration comprised of stockholders who *received deal consideration*), *with* A5593 (Baum Action plaintiff's first draft of settlement agreement predicating class eligibility on whether stock was held on record date).

[redacted]

Perhaps recognizing that this is devastating to their argument, Insurers argue (at 40) that "the settlement class included shareholders who did hold shares when the deal closed." But the settlement class almost certainly included shareholders who sold *before* the deal closed, which underscores that the Settlement was not tied to the adequacy of the deal consideration received by shareholders. Moreover, Insurers' assertion is divorced from the record. Insurers cite the Settlement Agreement, which defined the settlement class as "all Persons who purchased, sold, or held Harman common stock at any time from … the record date, through and including the date the merger closed." A2232. But this class would have included any shareholder who "held" shares on the record date but "sold" *before* the deal closed, which could have encompassed some or theoretically all recovering shareholders. This shows that the adequacy of the deal consideration was irrelevant to the Settlement.

The best response Insurers can muster is that because the Settlement was distributed on a per-share basis, it must represent an effective increase in deal consideration. But shareholder class action settlements are routinely distributed on a per-share basis because that is an efficient and equitable distribution method. A default distribution method (as opposed to the date on which the universe of participating shareholders is ascertained) has zero bearing on what the amounts paid actually "represent" to shareholders.

[redacted]

Insurers also argued below that even shareholders who sold shares before the deal closed would have been "impacted" by the inadequate deal price. A5705. But as the Superior Court aptly recognized, "plaintiffs alleging that they were only indirectly impacted by the inadequate consideration isn't enough" when it comes to the Exclusion. Ex. B at 27. That is because the Exclusion applies only to amounts that actually represent an effective increase in deal consideration to shareholders who claimed that their deal consideration was inadequate. It does not apply to amounts paid to shareholders who never received deal consideration but *may* have been *indirectly* impacted by the deal price.

ii. The Full Baum Action Record Confirms That the Settlement Did Not Represent an Effective Increase in Deal Consideration

The Baum Action plaintiff's decision to structure a settlement class that was not based on the receipt of deal consideration (let alone inadequate deal consideration) is consistent with the entirety of the Baum Action. Although Insurers cherry-pick from the record to suggest that the Baum Action only posed the risk of bump-up damages, the record as a whole yields the opposite conclusion.

The Baum Complaint's Prayer for Relief sought unelaborated compensatory and rescissory damages based on 100-plus paragraphs of allegations presenting myriad risks, including allegations that the transaction process was flawed because Harman's then-CEO improperly received roughly $50 million in the transaction. A1942; A1935 ¶102; A1937 ¶108. While the Baum Complaint *also* alleged that

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shareholders were harmed by the receipt of inadequate deal consideration, it did not limit the plaintiff to pursuing only that theory of relief as discovery progressed. As the plaintiff herself explained, the Baum Complaint asserted "*multiple* theories for relief." A3095 ¶21 (emphasis added). And the plaintiff actively preserved maximum flexibility regarding her damages theories.

For example, Insurers note that when asked to identify in an interrogatory "each category of damages" sustained due to the conduct alleged in the Baum Complaint, the plaintiff identified only one: a measure of that "compares the value of what the plaintiff received and the fair value of their shares." A3022-23. But they omit the plaintiff's simultaneous warning that "[d]amages are a subject for expert testimony, and it is premature at this stage of the litigation to calculate damages." A3023. [redacted] A2534; A1765 ¶5. Thus, even if Harman prevailed on its pending motion for interlocutory appeal and defeated the plaintiff's bump-up theory of recovery, it faced a material risk that the plaintiff's claim would survive. It was against that backdrop that the Baum Action settled at a court-recommended mediation for $28 million – *less than the estimated cost of defense*. A2539; A1765 ¶5.

Insurers' overreach is best evidenced by their treatment of the terms of Settlement and attendant filings. They argue, for example, that the Settlement

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Agreement confirms that the Settlement was an increase in deal consideration because the parties noted that they "intend[ed] this Settlement to be a final and complete resolution of all disputes between them with respect to [the Baum Action]." A2254. This circular argument simply begs the question as to what "disputes" were being resolved. And it ignores other portions of the Settlement Agreement that are far less vague, and which also support Harman's position.

For example, the Settlement Agreement confirms that Harman's decision to settle "was based solely on the conclusion that further conduct of the Litigation would be protracted and expensive" and to "avoid the costs, uncertainty and risks inherent in any litigation[.]" A2230. And it expressly provides that the Settlement "shall not be … construed …. as an admission or concession that the consideration to be given … represents the amount which could or would have been recovered after trial." A2254-56. *Nothing* in the Settlement Agreement tied the settlement payment to an increase in deal consideration, either implicitly or explicitly. On the contrary, it states the opposite.

Insurers' reliance on the Baum plaintiff's efforts to seek settlement approval is similarly off-base. Insurers conveniently omit that plaintiff's motion for settlement approval explained that her complaint identified "*multiple* theories for relief." A3095 ¶21 (emphasis added). The plaintiff further explained that the risk posed by Harman's motion for interlocutory appeal was an important motivation for

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the Settlement and that "there was substantial uncertainty regarding the range of possible damages, as well as any ultimately provable damages." A3104 ¶48; A3107 ¶57.

The flaw in Insurers' argument is perhaps best exemplified by the Class Notice. Insurers argue that the statement in the Class Notice that shareholders would "receive compensation" somehow shows that the plaintiff viewed this compensation as an increase in deal consideration. But the quoted clause reflects the opposite, noting that this "compensation" was based on the "risk-adjusted possibility of recovery after trial and any appeals." A2281. What the Class Notice does not say *anywhere* is that the Settlement represents an increase in deal consideration.

Instead, the section of the Class Notice titled "What is this litigation about?" describes the Baum Action as a lawsuit alleging proxy violations under federal securities laws. A2278-79. And the section titled "Why is there a settlement" explains that "both sides agreed to the Settlement to avoid the costs and risks of further litigation, including trial and post-trial appeals." A2281. That explanation is consistent with the settlement amount, which bears a close resemblance to defendants' defense costs and no relation to plaintiffs' pie-in-the-sky and legally untenable claims for greater deal compensation.

Critically, when confronted with this reality, AIG's corporate representative suggested that the Class Notice appeared to have been drafted to "steer" the

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Settlement away from the Exclusion. A5581 at 157:11-158:24. But that is belied by the fact that the Class Notice was first drafted *by the plaintiff*. A5593. Thus, all that is left is AIG's admission that the Settlement documentation prepared *by the plaintiff* steered the Settlement to covered risks of liability, which is fatal to Insurers' position.

2. The Baum Action Did Not Pose a Risk of Bump-Up Damages Based on the Facts Known to Harman at the Time of Settlement

Insurers' blanket dismissal of Harman's understanding of the risks it was settling (at 37-39) is contrary to Delaware law, which confirms that the availability of coverage for a settlement turns on the risk of liability the policyholder was settling based on the "facts known to [it]" at the time of settlement. *Premcor*, 2013 WL 6113606, at *3. Contrary to Insurers' suggestion, this is not merely a question of Harman's "motivations" but, rather, of its assessment of the *risks* resolved by the Settlement, which are inextricably intertwined with what the Settlement "represents."

Here, Insurers do not dispute that Harman never perceived a "risk that [it] might one day be required to pay damages representing an increase in deal consideration," and that it "never understood the Settlement to represent an effective increase in Merger consideration to Harman's former shareholders." A1765-66 ¶¶4, 6. That is because, at the time of settlement, the relevant "facts known to [Harman]"

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were that, despite the likely future success of its efforts to appeal the district court's pre-discovery ruling on plaintiff's inadequate consideration theory, Harman nevertheless faced the risk of monetary harm unrelated to the deal price, including damages based on allegations of improper compensation of its then-CEO, as well as other potential damages theories the plaintiff indicated she would advance if the case proceeded to discovery. A1765 ¶5. These risks far exceeded the $28 million settlement offer on the table, which was less than the anticipated cost of defense (thereby also capping *Insurers'* exposure).

Insurers' primary retort before the Superior Court was that §14(a) is not a viable avenue for a plaintiff to secure relief for improperly paid corporate compensation, such that this was never a risk Harman faced. A5699. Insurers' position is inconsistent with federal law. *See, e.g.*, *Gould v. Am.-Hawaiian S.S. Co.*, 387 F. Supp. 163, 171-72 (D. Del. 1974). It is also self-defeating and hypocritical. If, as Insurers argue, the Settlement of a non-viable claim for increased deal consideration under §14(a) could fall *within* the Exclusion, then a Settlement of a covered, non-viable claim based on improperly paid compensation would fall *outside* of the Exclusion. In any case, the plaintiff made clear that she had "multiple theories" of recovery, and signaled that she would advance these theories as discovery progressed.

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Insurers' attack (at 41-43) on the Superior Court's "speculation" as to the import of the settlement amount is also off base. The stark disparity between the $28 million settlement amount and the hundreds of millions of dollars the plaintiff claimed as damages for inadequate deal consideration is simply another data point confirming that the Settlement did not represent such an increase. Indeed, Insurers cannot point to a single piece of evidence that the Settlement amount was in any way arrived at or calculated based on how much the recovering class members should or could have received in the Transaction. That is because the Settlement was the product of an arms-length negotiation reflecting various risks and considerations – it was not a quasi-appraisal of what shareholders thought they were entitled to in the Transaction.

[redacted]

Somehow, according to Insurers, none of this matters. But under Delaware law, the plain terms of the Exclusion, and common sense, an assessment of what the Settlement "effectively" "represents" must consider the paying party's own understanding of what it was paying based on the facts known to it at the time of settlement. *Premcor*, 2013 WL 6113606, at *3.

3. Federal Law Underscores That the Settlement Does Not Represent an Effective Increase in Deal Consideration

That Harman never viewed the Settlement as representing increased deal consideration makes sense. Insurers have never disputed the accuracy of the Superior Court's conclusion that, under federal law, §14(a) does not permit a policyholder to secure damages representing such an increase. Nor could they. *See, e.g.*, *Gray v. Wesco Aircraft Holdings, Inc.*, 454 F. Supp. 3d 366, 404, 406-07 (S.D.N.Y. 2020) (dismissing §14(a) claim because "the difference between the Merger Consideration and the imputed value of Wesco stock based on [internal projections] is not 'actual damages' to plaintiff on account of the misrepresentation"), *aff'd*, 847 F. App'x 35 (2d Cir. 2021); *Barrows v. Forest Lab'ys, Inc.*, 742 F.2d 54, 57 (2d Cir. 1984).[6] Even *Komatsu*, Insurers' main authority on this point, acknowledged this reality. 58 F.4th at 307.

[6] *See also In re GTx, Inc. S'holders Litig.*, 2020 WL 3439356, at *5 (S.D.N.Y. June 23, 2020); *In re Turquoise Hill Res. Ltd. Sec. Litig.*, 625 F. Supp. 3d 164, 210 (S.D.N.Y. 2022); *Mack v. Resolute Energy Corp.*, 2020 WL 1286175, at *10-12 (D.

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This reality was front and center in the parties' minds when they settled and sought approval of the Baum Action Settlement. Indeed, it explains *why* Harman did not believe it could ever ultimately be required to pay bump-up damages, and *why* the plaintiff structured the settlement class as it did and drafted the Class Notice to "steer" the settlement away from bump-up relief.

Insurers would have this Court ignore this reality and conclude, based on the district court's *pre-discovery* ruling regarding the sufficiency of the Baum Complaint, that the "real result" of the Settlement is that Harman paid an amount "symbolizing" a form of damages Harman never could have been required to pay had it declined to settle and litigated the case through trial and appeal. That is a patently unreasonable application of the Exclusion. At best, it creates a "hidden trap or pitfall" in the Policy that contravenes Harman's reasonable expectations of coverage based on the terms of the Policies as a whole. *See Ferrellgas Partners L.P. v. Zurich Am. Ins. Co.*, 319 A.3d 849, 868 (Del. 2024). In fact, unrebutted record evidence reveals that Harman paid nearly $1 million in *additional* premiums for run-off coverage specifically to cover Transaction-related litigation, demonstrating its

Del. Mar. 18, 2020), *aff'd sub nom. In re Resolute Energy Corp. Sec. Litig*., 2022 WL 260059, at *3 (3d Cir. Jan. 27, 2022); *Lockspeiser v. W. Maryland Co*., 768 F.2d 558, 560 (4th Cir. 1985); *Kuebler v. Vectren Corp*., 13 F.4th 631, 646-47 (7th Cir. 2021); *In re Ocera Therapeutics, Inc. Sec. Litig*., 806 F.App'x 603, 605 (9th Cir. 2020).

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reasonable expectation of coverage for a settlement of Transaction-based litigation like the Baum Action. A1771 ¶¶8-10.

Insurers' accusation (at 21-24) that the Superior Court injected a viability requirement into the Exclusion is a strawman. The Superior Court justifiably considered federal law governing §14(a) claims—which Insurers do not contest—merely as a "meaningful informant" of what the Loss *represents*, a separate element of the Exclusion. Ex.B at 22.

Insurers further err (at 21) in accusing the Superior Court of rewriting the Policies' terms. In fact, it is Insurers who are engaged in that very tactic. For instance, Insurers contend (at 22) that the bump-up provision at issue in *Joy Global*, 555 F. Supp. 3d at 595, involved a "similar" bump-up exclusion and that the court held that the exclusion barred coverage for the settlement of a §14(a) claim *despite* recognizing that a claim for increased deal consideration is not viable under §14(a). Insurers fail to mention, however, that in reaching this conclusion, the district court in *Joy Global* expressly distinguished Delaware authority interpreting the very Exclusion *at issue here* on the ground that the Exclusion here is "narrower." *Id.* at 595 (citing *Northrop*, 2021 WL 347015, at *19). Specifically, the district court recognized that the *Joy Global* exclusion broadly applies to *all* Loss paid in connection with a Claim simply *alleging* inadequate deal consideration, whereas the Exclusion at issue here *also* requires that the Loss actually *represent* such an

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increase. This distinction is precisely why the viability of a §14(a) claim was not dispositive in *Joy Global*.

On *Joy Global*'s appeal, the Seventh Circuit made this same point, observing that the Exclusion "differs from the definition of 'inadequate consideration claim' in Joy Global's policies." *Komatsu*, 58 F.4th at 309. The Seventh Circuit thus faulted the policyholder for asking it "to proceed as if all D&O policies contain the same language" even though "they don't." *Id.* Insurers repeat this exact error in reverse.[7]

Finally, Insurers' argument (at 30-31) that the *Baum* court could not depart from the "law of the case," and that the Superior Court's holding would lead to the "absurd result" of "Delaware courts … act[ing] as appellate courts in reviewing earlier decisions" is hyperbolic fearmongering. The *Baum* court's conclusion that the plaintiff's allegations were legally sufficient to survive pre-discovery motion practice says little about the long-term, post-discovery viability of the plaintiff's

[7] Insurers' reliance on *Towers Watson*, which is currently on appeal to the Fourth Circuit, fares no better. There, applying materially different Virginia law, the district court held that the Exclusion barred coverage for the settlement of a §14(a) claim because the *only* monetary relief the policyholder sought was an increase in deal consideration. *Towers Watson & Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2024 WL 993871 (E.D. Va. Mar. 6, 2024). Here, the Baum Action involved a complaint that presented various potential risks of monetary harm, which settled before the plaintiff had provided an expert damages report.

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pursuit of bump-up damages under federal law, let alone how the Baum Action parties—Harman in particular—understood the likelihood of that risk materializing.

In any event, the "law of the case" doctrine precludes re-litigation of an issue in a case that was already decided *in that same case*. *State v. Truitt*, 1996 WL 527217, at *1 (Del. Super. Aug. 14, 1996) ("[T]he law of the case bars relitigation 'when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course *of the same litigation*.'"), *aff'd*, 687 A.2d 197 (Del. 1996). The doctrine does not have preclusive effect in a different proceeding, let alone for purposes of determining the applicability of an insurance policy exclusion, which must be construed strictly and narrowly in favor of the policyholder. *Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 860 (Del. 2008).

4. Insurers' Moral Hazard Argument Backfires

Insurers posit that their argument is consistent with the moral hazard considerations underpinning the Exclusion, but the opposite is true. The reality is that Insurers left Harman to flounder in a Catch-22 that had nothing to do with the purported moral hazard considerations underlying the Exclusion. As Insurers would have it, Harman could continue to fight the Baum Action through discovery, summary judgment, trial, and appeal while Insurers footed the bill for some, but not all, of an expected $25-$30 million in defense costs. But when Harman tried to settle the case [redacted] to avoid the burden of litigation,

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and for less than the likely cost of defense (which does not fall within the Exclusion), Insurers turned off the spigot, leaving Harman high and dry. That cannot possibly be the intended function of the Exclusion, as it would have no impact on the moral hazard considerations Insurers invoke. Instead, their interpretation of the Exclusion would have the primary effect of chilling settlements in violation of Delaware public policy. *See Crescent/Mach I Partners, L.P. v. Dr Pepper Bottling Co. of Tex.*, 962 A.2d 205, 208 (Del. 2008) ("Delaware law favors settlements[.]").

At the same time, Insurers' expansion of the Exclusion to effectively bar indemnity coverage for the vast majority of M&A litigation would result in a significant shifting of the risk of such litigation from insurers, who accepted massive premiums to assume that risk, to policyholders, who thought they purchased insurance to protect themselves from it. If Insurers wanted to sell defense-costs-only coverage for most M&A-related claims—the net effect of their argument here—they were required to say so in plain and unmistakable language. They failed to do so.

5. The Attorneys' Fee Component of the Settlement Does Not Fall Within the Exclusion

At the very least, the nearly $9 million that Harman paid in plaintiff's attorneys' fees and administrative costs as part of the Settlement—an amount that was indisputably never held or controlled by shareholders—cannot represent an

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increase in deal consideration to those shareholders.[8] Rather, these amounts were paid off the top, after which only the "Net Settlement Fund" was distributed to shareholders. A2244-45. Such amounts do not fall within the narrow confines of bump-up exclusions. *See Safeway Stores, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 64 F.3d 1282, 1286 (9th Cir. 1995) (insurance policy did not cover portion of settlement that "amounted to … upping [the merger] purchase price", but did cover attorney fees because "[t]he lawyers got the money, not the shareholders"); *Ceradyne Inc. v. RLI Ins. Co.*, 2022 WL 16735360, at *12 (C.D. Cal. Oct. 31, 2022) (holding attorneys' fee component of settlement did not fall within bump-up exclusion).

In fact, indisputable record evidence shows that AIG's own claim handlers, including AIG's VP of D&O Claims, agreed with Harman's position that these amounts did *not* fall within the Exclusion. A2740; A2746. Insurers cannot establish that their interpretation of the Exclusion to encompass such amounts is the only reasonable one, as required by Delaware law, when their own claim handlers agreed with Harman.

[8] The Superior Court did not address this argument because it found the entire Settlement did not fall within the Exclusion. This Court should affirm, but in all events, the Court can affirm any part of the judgment on any ground in the record. *See Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012).

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Insurers' sole retort before the Superior Court was that (contrary to the view of AIG's claim-handlers) because the settlement was a "common fund," the entirety of the settlement was paid for the "benefit" of the class and, thus, falls within the Exclusion. A5706. But the Exclusion does not apply to amounts that "benefit" the class in an esoteric sense, let alone when it is construed strictly and narrowly in favor of coverage, as required. And the common fund doctrine does not inform, let alone control, what the attorneys' fee component of the Settlement "effective[ly]" represents under an insurance policy exclusion that never mentions that doctrine. Rather, the "real result" of the settlement—the standard Insurers advocate (at 33)—is that $8,803,809.79 of the Settlement was never paid to or controlled by recovering shareholders, such that it would make little sense to conclude that this amount represents an effective increase in their deal consideration.

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II. THE BAUM ACTION WAS NOT A CLAIM ALLEGING INADEQUATE DEAL CONSIDERATION

A. Counterstatement of Question Presented

Was the Baum Action a "Claim alleging" the receipt of inadequate deal consideration within the meaning of the Exclusion given that bump-up damages are not viable under §14(a)? A1745.

B. Scope of Review

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

C. Merits of the Argument

As stated in Section I, Insurers cannot establish that the Settlement represents an effective increase in deal consideration under the second element of the Exclusion, which was the focus of the Superior Court's holding. Thus, most of their brief, which is devoted to the Exclusion's first element requiring a Claim alleging the receipt of inadequate deal consideration, is irrelevant. But Insurers are also wrong that the Baum Action was a Claim alleging the receipt of inadequate deal consideration under the Exclusion.

Insurers devote the majority of their brief to a strawman. They argue that the Superior Court erred in finding that the Baum Action was not a Claim alleging inadequate deal consideration because such a Claim is not viable under §14(a). But the Superior Court's consideration of whether bump-up damages are viable in the context of a §14(a) claim was merely as a "meaningful informant" of whether the

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Settlement *represented an effective increase in deal consideration*, which is the *second* prong of the Exclusion. As stated, this was consistent with the Policies' plain language, Delaware law, and common sense. And, as explained in Point I, this was only one of numerous factors the Superior Court considered in reaching its conclusion regarding the second prong of the Exclusion.

In any case, the Baum Action was not a Claim alleging the receipt of inadequate deal consideration under the Exclusion. Under Delaware law, for a Claim to "allege" a particular fact or circumstance within the meaning of an insurance policy exclusion, that fact or circumstance must be meaningfully linked to the viability of the Claim faced by the policyholder and the Loss the policyholder could incur. *See, e.g.*, *ACE Am. Ins. Co. v. Guaranteed Rate, Inc.*, 305 A.3d 339, 347 (Del. 2023). There was no such meaningful link here.

The Baum Action was a "Securities Claim" predicated on alleged violations of §§14(a) and 20(a) of the Exchange Act. *See, e.g.*, A1893-94 ¶¶1, 5. The "subject of" (*see Guaranteed Rate*, 305 A.3d at 347) that Securities Claim was that shareholders were deprived of the ability to cast an informed vote on the Transaction due to Harman's alleged proxy violations, and that if they had accurate information, they would have voted *against* the Transaction. A1924 ¶75; A1939-40 ¶120. These alleged proxy violations conferred standing on the plaintiff and, thus, made the case actionable under §14(a) and gave rise to Harman's potential liability. And, critically,

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Insurers do not dispute that under federal law, the plaintiff never could have secured bump-up damages had the Baum Action proceeded to trial and appeal. Thus, there is no "meaningful link" between the Baum Complaint's allegations of inadequate deal consideration and the "Claim" for which coverage is sought.

Insurers' suggestion that this conclusion would result in Delaware courts sitting as quasi-appellate courts of underlying federal decisions makes little sense given that (1) *they do not dispute* federal law on the non-viability of bump-up damages under §14(a), and (2) the Baum Action settled under the shadow of Harman's motion for interlocutory appeal, such that this issue was far from settled. Indeed, *insurers* frequently ask courts to reassess underlying determinations as applied to the insurance policy. As just one example, even after a court confirms that a settlement is fair, insurers nevertheless often challenge the reasonableness of the settlement. Thus, the Superior Court prudently looked at federal law more broadly in assessing what the Settlement here represented, rather than myopically focusing on an early, pre-discovery decision.

Insurers also overstate the law of the case doctrine. Nothing precludes the Superior Court in the context of an insurance coverage dispute from assessing the interplay between federal law and an insurance policy exclusion. *See, e.g.*, *Vigilant*, 37 N.Y.3d at 567 (finding that SEC disgorgement is not a "penalty" within the meaning of a D&O policy even though the Supreme Court had held that it was a

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"penalty" for purposes of determining the applicable statute of limitations). Equally baseless is Insurers' suggestion (at 22-23) that the Superior Court's decision "'create[s] irreconcilable conflicts' with other provisions" because the word "alleging" is used in other portions of the Policy, like the "Securities Claim" definition. Under Delaware law, exclusions and coverage grants are interpreted differently. Thus, it makes perfect sense to assess the viability of a Claim in the context of an *exclusion* but not in the context of whether that Claim triggers coverage in the first place.

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CONCLUSION

For the foregoing reasons, this Court should affirm the Superior Court's order.

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