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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
v.	: PRW (CCLD) (Wallace, J.)
HARMAN INTERNATIONAL INDUSTRIES, INCORPORATED,	: Original Filed May 13, 2025 :Public Version Filed: May 30, 2025
Plaintiff-Below/Appellee.	:

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Harman[1] contends that the Bump-Up Provision's objective terms are governed by Harman's own ***subjective*** beliefs regarding why it settled the *Baum* Action. This approach is not supported by the text of the Bump-Up Provision and has not been adopted by any other court. Furthermore, Harman's self-serving, post-hoc characterization of its purported beliefs at the time it decided to settle are in direct conflict with the uncontroverted contemporaneous record, including assertions Harman itself made in the *Baum* Action.

When Harman sought dismissal of the *Baum* Action, it argued that "Plaintiff's ***entire theory*** of harm is predicated on her claim that Harman . . . was actually worth more than the $112 per share offered by the proposed merger." A5099 (emphasis changed). Despite this concession, Harman now insists that the *Baum* plaintiff alleged "multiple theories," that the *Baum* Action "was not a Claim alleging the receipt of inadequate deal consideration," and that its settlement of the *Baum* Action did not represent a "bump-up" in consideration. Appellees' Answering Brief ("AB") at 16, 21, 25, 29, 30, 33, 44. Although Harman acknowledges that the applicability of the Bump-Up Provision "turns . . . on the scope of the record as a whole," Harman

[1] This brief adopts the definitions set forth in the Opening Brief of Appellants ("OB").

urges this Court to ignore the record at the time of settlement in favor of hypothetical future events that never transpired. AB at 23–24.

First, Harman ignores that, at the time of settlement, the *Baum* plaintiff, Harman, and the *Baum* court all agreed that the *Baum* complaint pled a single theory of damages (inadequate deal consideration), and that this was the only damages theory the *Baum* plaintiff disclosed in discovery, [redacted], and identified in its settlement papers. Instead, Harman urges the Court to focus on Harman's subjective view that, "absent settlement," discovery would have yielded evidence from which the *Baum* plaintiff ***could have*** asserted unspecified "alternative" damages theories. AB at 8, 13, 28–29.

Second, Harman asks the Court to ignore—or worse, overrule—the *Baum* court's two decisions holding that the *Baum* complaint pled a viable § 14(a) violation predicated on inadequate deal consideration. Harman instead urges the Court to credit ***Harman's belief*** that, had Harman not agreed to settle, Harman would have ultimately prevailed in overturning the *Baum* court's rulings. AB at 12–13, 32–33.

Harman's suggestion that the Court should ignore (or rewrite) the actual record in the *Baum* Action at the time of settlement in favor of Harman's speculation as to future events and Harman's own subjective (and self-serving) reasons for settling is not supported by language in the Bump-Up Provision. Further, noticeably absent from Harman's brief is any legal authority supporting its preferred approach.

Harman offers no sound reason why this Court should depart from the line of bump-cases applying similar bump-up provisions to bar coverage under these circumstances.

At the time Harman settled the *Baum* Action, the plaintiff maintained only one theory of harm—the one the *Baum* settlement resolved. Because the *Baum* settlement fits squarely within the unambiguous language of the Bump-Up Provision, the Court should reverse.

ARGUMENT

I. THE *BAUM* ACTION WAS A "CLAIM ALLEGING" INADEQUATE CONSIDERATION.

Though Harman previously conceded that the *Baum* plaintiff "***alleged that shareholders received inadequate deal consideration***," A1745 (emphasis added), Harman now attempts to walk this back. Harman argues the "Baum Action was not a Claim alleging the receipt of inadequate deal consideration" because the *Baum* plaintiff's damages theory, according to Harman, was not viable. AB at 44.

Harman's inconsistencies do not stop there. Before the Superior Court, Harman argued a viability requirement arose from the "Claim alleging" language in the first prong of the Bump-Up Provision. A5548–49. On appeal, however, Harman contends the Superior Court correctly rejected this approach by inserting a viability requirement into the second prong of the Bump-Up Provision—that is, whether the settlement represents an effective increase in consideration. *See, e.g.*, AB at 6, 37, 43–44. Confusingly, however, Harman also renews its argument that viability is required by the "Claim alleging" language. *Id.* at 44–45. Harman's inconsistency regarding the source of the purported viability requirement has a simple explanation: there is no viability requirement in the Bump-Up Provision.

A. The Bump-Up Provision's Plain Language Does Not Support a Viability Requirement.

By its plain language, the Bump-Up Provision's first prong requires only a "Claim alleging" inadequate consideration. A3417, 3421–22. Harman does not dispute that the ordinary meaning of an "allegation" is an assertion "without proof" and does not require legal or factual viability. AB at 43–47. Nonetheless, Harman asks the Court to disregard the plain meaning in favor of an interpretation that limits "allegations" to assertions that are "meaningfully linked" to the viability of the assertion. *Id.* at 44–45. This argument finds no support in the law.

The sole case Harman cites focuses on factual causation, specifically, whether a Claim alleging violations of the False Claims Act "aris[e] out of" an insured's professional services. *ACE Am. Ins. Co. v. Guaranteed Rate, Inc.*, 305 A.3d 339, 347 (Del. 2023) (holding "[t]here is no causal connection between the failure to perform professional services and the damages alleged by the government") (alterations adopted). The only "meaningful linkage" this Court required was between the "subject of the FCA claims—false certifications—and the underlying conduct used to demonstrate the falsity of the claims—underwriting loans." *Id.* at 347–48. Nowhere in that discussion is any mention of "viability" or the "sufficiency" of the government's allegations. Nor did *Guaranteed Rate* conflate the term "alleging" with "arising out of."

Further, Harman has no meaningful response to the Insurers' argument that interpreting "alleging" to include a viability requirement would create internal inconsistencies in the Policy and yield absurd results. OB at 22–23. Citing nothing, Harman's only response is that Delaware law "require[s]" different meanings to apply "depending on whether a particular provision grants or restricts coverage." AB at 7; *see also id*. at 46. This idea—that "alleging" includes a viability requirement when it excludes coverage but does not when in the provision granting coverage—is incorrect.

Even assuming *arguendo* that the Bump-Up Provision is an exclusion,[2] Harman provides no authority for its suggestion that a word can bear an entirely different meaning depending on where it appears within an insurance contract, i.e., an exclusion or grant of coverage. *See Kabakoff v. Zeneca, Inc.*, 2020 WL 6781240, at *11 n.123 (Del. Ch.), *aff'd*, 264 A.3d 214 (Del. 2021) ("When a word is used in different parts of a contract, that word is presumed to have the same meaning throughout.").

Moreover, Harman misapprehends Delaware law. Exclusions are only interpreted narrowly when the policy terms are ambiguous. *See Twin City Fire Ins.*

[2] The Insurers disagree that the Bump-Up Provision is an exclusion. OB at 15 n.5.

Co. v. Del. Racing Ass'n, 840 A.2d 624, 628–30 (Del. 2003) (ruling exclusion was ambiguous before applying *contra proferentem* rule against the insurer). Harman does not argue, and the Superior Court did not hold, that the Bump-Up Provision is ambiguous. Accordingly, Harman provides no basis to apply the *contra proferentem* rule or otherwise to ascribe a completely different meaning to the same, unambiguous term depending on where it appears within a policy.

B. Harman Is Without Any Legal Authority to Support Its Position.

Tellingly, Harman cites no case that has adopted Harman's interpretation of the word "alleging" to include a viability requirement. And Harman is unable to distinguish the bump-up cases that expressly reject the interpretation of "alleging" that Harman advances. *See Komatsu Mining Corp. v. Columbia Cas. Co.*, 58 F.4th 305, 307 (7th Cir. 2023) ("[T]he settlement stands whether or not the complaints came within §14."); *Towers Watson & Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 2024 WL 993871, at *5 (E.D. Va.) (holding that "[b]ecause 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," without assessing the allegations' viability).

Towers Watson involved precisely the same Bump-Up Provision and a virtually identical set of facts—two shareholder actions alleging § 14(a) violations based on allegations that a misleading proxy statement resulted in the shareholders

receiving inadequate consideration for their shares. 2024 WL 993871, at *1 n.4, *8. Harman attempts to distinguish *Towers Watson* on the basis that it involved "materially different Virginia law," but fails to explain what that material difference is. AB at 38 n.7. In fact, under both Virginia and Delaware law, the plain meaning of a term in an insurance contract will be enforced if it is unambiguous—as the Bump-Up Provision here is. *Towers Watson,* 2024 WL 993871, at *2; *Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1064–65 (Del. 2010).

As for *Komatsu*, Harman urges the Court to disregard the Seventh Circuit's opinion because the bump-up provision there did not limit the provision's application to amounts that represent an effective increase in consideration. AB at 37–38. But Harman does not dispute that the *Komatsu* decision specifically rejects Harman's interpretation of "alleging" and offers no reason why this Court should not do the same. *Id.* at 44–45; *Komatsu*, 58 F.4th at 307–08.

The first prong of the Bump-Up Provision is clear and unambiguous: the Claim need only "alleg[e]" inadequate consideration. And Harman has expressly conceded that the *Baum* plaintiff "alleged that shareholders received inadequate deal consideration." A1745. This requirement is satisfied.

II. THE *BAUM* ACTION SETTLEMENT "REPRESENT[S]" AN "EFFECTIVE[] INCREASE[]" IN CONSIDERATION.

Harman agrees that, at the time Harman settled, the *Baum* plaintiff was pursuing "bump-up damages." AB at 13. And, during the *Baum* Action proceedings, Harman further agreed that those damages constituted the plaintiff's "entire theory of harm." A5099. Harman now insists, however, that the Bump-Up Provision is inapplicable because Harman's settlement does not represent a bump-up in consideration, and that in its opinion, "the adequacy of the deal consideration was ***irrelevant*** to the settlement amount." AB at 4.

Harman asks this Court to disregard the allegations of inadequate consideration that the *Baum* settlement actually resolved (the proper, objective test for determining what the settlement represents) because (1) in Harman's view, plaintiff's bump-up damages theory was not viable; and (2) Harman faced the risk of other unspecified (and unasserted) categories of damages. For support, Harman principally relies on its own speculation regarding how the *Baum* litigation might have unfolded if it had not agreed to settle instead of the actual record at the time of settlement. Further, the other considerations on which Harman focuses—selective aspects of the settlement class and the settlement papers [redacted]—do not change what the settlement objectively represents.

A. Harman Ignores the Proper Inquiry for Determining What the Settlement Represents.

Adopting language from the Superior Court, Harman argues that viability is a "meaningful informant" of what a settlement effectively "represent[s]." AB at 37. However, Harman does not anchor this argument to any text within the Bump-Up Provision or any legal authority.

As the *Towers Watson* court explained, because the Bump-Up Provision "reaches ***any*** amounts 'representing' that which 'effectively increase[s]'" consideration, to determine what the settlement represents, the controlling inquiry must be directed to the "overall result" and the allegations resolved by the settlement. 2024 WL 993871, at *8 (emphasis added). Harman shareholders indisputably received additional money because of the *Baum* Action. And the plaintiff's "entire theory of harm" was predicated on allegations of inadequate consideration. A5099. The settlement itself confirms that it is "intended by the Settling Parties to fully, finally, and forever resolve, discharge, and ***settle the above-captioned action and all claims asserted against Defendants therein***, and all Released Claims." A2227 (emphasis added). Thus, the settlement must represent an effective bump-up in consideration paid to the shareholders. On this point, Harman is unable to distinguish *Towers Watson* and refuses to grapple with its own prior concession that the *Baum* plaintiff's "entire theory of harm" was inadequate consideration.

Further, Harman's concern that ignoring viability "creates a 'hidden trap or pitfall'" in the Policy is unfounded. Harman asserts it expected run-off coverage "to cover Transaction-related litigation," and applying the Bump-Up Provision to the *Baum* settlement "contravenes" this "reasonable expectation[]." AB at 36–37. Contrary to Harman's suggestion, purchasing run-off coverage does not expand the scope of coverage but rather extends the time period for the scope of coverage already purchased, which, here, includes a Bump-Up Provision. *Ferrellgas Partners v. Zurich Am. Ins. Co.*, 319 A.3d 849, 870 (Del. 2024) (explaining that "a purchaser of the Run-Off Period [obtains a] benefit in that they would be covered for qualifying claims brought after the Policy Period has lapsed"). Moreover, Harman cannot rely on its "reasonable expectations" in the face of unambiguous contractual terms. *See Eagle Indus. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

B. Harman Refuses to Acknowledge the Record in the *Baum* Action at the Time Harman Settled.

Determining what allegations the settlement resolved—i.e., the overall result of the settlement—requires an assessment of the record, as a whole, at the time of settlement. Though Harman agrees that the applicability of the Bump-Up Provision "turns . . . on the 'scope of the record' as a whole," AB at 23–24, Harman ignores the two aspects of the record at the time of settlement that bear most directly on what the settlement represents: (1) the only theory of harm the plaintiff had alleged was

inadequate consideration, and (2) the court had twice ruled that those allegations formed a viable theory of loss. Harman urges the Court to disregard these key parts of the record in favor of its own attorney's post-hoc affidavit describing her subjective belief regarding how the *Baum* Action might have proceeded had Harman never settled—future events that never happened and are not part of the record.

1. Harman Settled After the *Baum* Court Twice Ruled That the Plaintiff's Bump-Up Theory of Loss Was Viable.

The *Baum* court twice ruled that the plaintiff's loss causation theory alleging inadequate consideration supported the § 14(a) violation allegations. A3085; *Baum v. Harman Int'l Indus*., 575 F. Supp. 3d 289, 298–301 (D. Conn. 2021). Harman urges the Court to disregard these rulings because Harman is confident that, if it had not chosen to settle, the Second Circuit would have reversed. AB at 3, 12, 16. While Harman's belief that it would have ultimately prevailed may have impacted how much Harman was willing to pay to settle, it certainly does not impact what the settlement resolving the case represented.

Harman further dismisses the *Baum* court's rulings as "pre-discovery," but fails to explain why that matters. Both decisions were rulings as a matter of law. *See, e.g.*, A3083–85; *Baum*, 575 F. Supp. 3d at 299–301. Harman cites no developments during discovery that impacted the court's ruling on the viability of the plaintiff's theory of loss. AB at 11–12. The best Harman can offer is that it had

filed a motion for an interlocutory appeal of the *Baum* court's ruling, but that motion was still pending when Harman settled. *Id.* at 12.

Harman cannot undo the court's ruling post-settlement through a separate proceeding. *In re IBP, Inc.*, 793 A.2d 396, 397 (Del. Ch. 2002) ("I decline to vacate a post-trial judicial opinion at the instance of a party whose own voluntary decision to settle rendered moot the issues decided by that opinion."); *Crescent/Mach I Partners v. Dr Pepper Bottling Co. of Tex.*, 962 A.2d 205, 209 (Del. 2008) ("[B]y settling, the parties contractually gave up their right to contest pre-settlement rulings."). When the *Baum* parties reached their agreement, the *Baum* court's ruling that the plaintiff's allegations of inadequate consideration were viable was the law of the case. And, as evidenced by Harman's repeated efforts to reverse this ruling prior to settlement, this was a critical part of the record when Harman chose to settle.

Importantly, Harman does not dispute that the Superior Court's ruling is directly at odds with the *Baum* court's rulings on viability. AB at 45. Nor does Harman dispute that the Superior Court's decision places a Delaware ***state court*** in a position of reviewing a ***federal court's*** decisions on an issue of ***federal law***. AB at 45. Instead, Harman responds only that the Superior Court was legally permitted to do so (because the law of the case doctrine does not prohibit it) and surmises that insurers ask courts to do the same thing all the time. *Id.* Harman fails to cite even a single case in support of its accusation that unnamed insurers engage in the same

conduct, let alone any case supporting the proposition that courts in an insurance coverage case should "reverse" the substantive decisions of courts in the underlying action. Harman also does not identify any limiting principle for inviting this type of substantive review by courts in subsequent coverage litigation. In short, Harman leaves unrebutted the concerns set forth the Insurers' brief that the Superior Court's decision to override the *Baum* court's rulings violates both principles of comity and Delaware's strong public policy of "staying in its own lane" when it comes to federal securities law—and invites other courts to do the same. OB at 31.

2. At the Time of Settlement, the *Baum* Plaintiff Had Never Sought Damages for Any Other Alleged Injury.

Harman stresses no less than eight times throughout its brief that it faced "other" or "alternative" theories of harm beyond inadequate consideration. AB at 4, 8, 11–12, 13, 16, 25, 28–29, 30, 33. Harman insists that it paid $28 million, ***not*** to resolve the theory of harm actually alleged in the *Baum* complaint, but to resolve "other" unspecified damages theories. Putting aside the credibility of such an assertion, the record at the time of settlement is uncontroverted: the *Baum* plaintiff had asserted only one damages theory, and it was inadequate consideration. A2999–3001; A3022–23; A2534; A3107. Harman fails to cite any evidence in the record that any other theory was ever asserted or to acknowledge its own concession that bump-up relief was the plaintiff's "entire theory of harm." A5099.

Harman initially relies on the *Baum* plaintiff's broad request for any "compensatory and/or rescissory damages" in her Prayer for Relief to suggest that she sought damages beyond inadequate consideration. AB at 28. But when Harman asked the plaintiff to specify what those damages were, the *Baum* plaintiff identified only one category of damages: inadequate consideration. A3022–23. Harman's only response to this sworn interrogatory answer is that the *Baum* plaintiff, like any plaintiff represented by competent counsel, reserved the right to amend her response as necessary in the future. *Id.*; AB at 29. But Harman strategically omits that the response was never amended prior to settlement. AB at 11–12, 29.

Next, Harman contends the *Baum* plaintiff ***could*** have sought "damages based on allegations of improper compensation of its then-CEO." AB at 33. But she never did. Harman supplies no citation to any portion of the record in which the plaintiff ever actually sought such damages. Harman does not dispute that when asked to identify "each" category of damages, the plaintiff did not identify disgorgement of Mr. Paliwal's compensation or any other damages based on amounts he allegedly received improperly. A3022–23. Nor was disgorgement of Mr. Paliwal's compensation mentioned [redacted] anywhere in the settlement documents. A2534; A3107.

Against the plaintiff's own sworn interrogatory answer at the time of settlement, Harman offers only an affidavit from Harman's attorney—executed long

after the *Baum* Action had resolved for the purpose of this coverage action—stating that she believed there were other (unspecified) "risks of liability and damages." A1765 ¶ 5; AB at 33. As an initial matter, Harman cannot use its own attorney's speculation as a "fact" to defeat summary judgment. *See Paul Elton, LLC v. Rommel Del., LLC*, 2021 WL 6141588, at *5 (Del. Ch.) (rejecting affidavits that were "filled with . . . self-serving justifications [that did not] suffice[] to create ambiguity nor present a genuine issue of material fact"); *Wilson v. Metzger*, 2021 WL 2355230, at *1 (Del. Super.) ("Absent further supporting evidence, a self-serving, conclusory affidavit alone is insufficient to justify summary judgment."). But more importantly, Harman's lawyer's post-hoc declaration of her subjective belief is not part of the record in the *Baum* Action; such testimony created after settlement is not relevant. Harman's own authority confirms this. AB at 32, 35 (citing *Premcor Refin. Grp. v. Matrix Serv. Indus. Contractors*, 2013 WL 6113606 (Del. Super.)). Under *Premcor*, "the potential for a covered liability" is established "on the facts known at the time of settlement[, which] may be demonstrated by the pleadings, pre-trial discovery, evidence, and testimony existing ***before*** settlement." 2013 WL 6113606, at *3 (emphasis added).

Beyond Mr. Paliwal's compensation, Harman never identifies what "other theories" of harm it (or its attorney) believed the *Baum* plaintiff ever asserted (or could have asserted). And there is no citation to any part of the record evidencing

another "alternative" theory of harm beyond inadequate consideration. [redacted]

Lastly, Harman relies on the *Baum* plaintiff's counsel's reference to "multiple theories of relief" in his declaration in support of preliminary approval of the settlement. AB at 16 (citing A3095 ¶ 21). When read in context, however, it is readily apparent that counsel was referring to the multiple theories the plaintiff developed to support her allegation that the proxy materials were misleading. A3094–95 ¶¶ 20–21 (explaining that § 14(a) violations require allegations specifying why a particular statement was misleading and supporting a strong inference of intent and then stating "[i]n recognition of those issues," counsel engaged in a detailed factual investigation "to draft a strong Amended Complaint, with multiple theories for relief"). Nowhere in counsel's 85-paragraph declaration does he describe any other alleged harm or injury to the class beyond inadequate consideration. More to the point, where the declaration does specifically address damages, counsel was clear that plaintiff's damages theory was based solely on inadequate consideration: He describes 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—testimony that Harman refuses to acknowledge in its brief. A3107 ¶ 56.

In this regard, Harman's efforts to distinguish *Towers Watson* on the facts fall flat. Harman argues that *Towers Watson* is not on point because the *Baum* Action (unlike *Towers Watson*) "involved a complaint that presented various potential risks of monetary harm." AB at 38 n.7. But again, beyond the allegations of improper compensation to Mr. Paliwal (which plaintiff never pursued as a damages theory), Harman fails to identify any other "risks of monetary harm" that it believes the *Baum* complaint alleges. And the *Towers Watson* complaint contained similar allegations of improper executive compensation. *Towers Watson*, 2024 WL 993871, at *1 & n.4, *8.

Harman's effort to contrast the *Baum* plaintiff's allegations with the so-called "classic" application of the Bump-Up Provision is similarly misguided. AB at 1. Harman suggests that the Bump-Up Provision was not intended to apply to Section 14(a) allegations (which Harman insists cannot be predicated on inadequate consideration) but rather to "certain state-law appraisal or quasi-appraisal actions" such as the one Harman settled in 2017. *Id.* at 3–4. But this Court already has held that a state-law appraisal action is not a "Securities Claim." *See In re Solera Ins. Coverage Appeals*, 240 A.3d 1121, 1133 (Del. 2020) ("Because appraisal actions involve no adjudication of wrongdoing, they do not involve 'violations' of any law

or rule, and thus, they do not fall within the definition of a 'Securities Claim.'"). Because the Policy covers only Harman's "Loss" "arising from any Securities Claim," the appraisal actions Harman references do not fall within the definition of Loss in the first place, rendering the Bump-Up Provision meaningless. A3401, A3421–22, A3441; *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 291 (Del. 2001) ("[T]he terms of an insurance contract are to be read as a whole and given their plain and ordinary, meaning.").

Harman's suggestion that it paid $28 million to resolve an unidentified theory of damages that the *Baum* plaintiff never sought simply lacks credibility. AB at 8, 33. The *Baum* plaintiff was represented by experienced and able counsel. A3111 ¶ 70 ("Robbins Geller has significant experience in representing investors in securities fraud cases and the team of attorneys litigating this case are experienced trial lawyers, particularly in trials adjudicating stockholder disputes to mergers and acquisitions."). Her counsel "reviewed 43,274 pages of documents from Defendants and their third-party financial advisors," compared a "massive amount of information regarding Harman's historical forecasting practices and expected business outlook" against the Proxy's disclosures, and "retained and consulted with a corporate finance and valuation expert." A2560; A3095 ¶ 21. Had discovery revealed some "other" or "alternative" basis to seek damages, it is difficult to conceive that Baum's counsel would have ignored it.

The proper inquiry must focus on what the settlement objectively resolved. Otherwise, every insured could create insurance coverage for itself with a post-hoc proclamation from its own attorney declaring that the insured was driven to settle based on a belief that "other" damages could have been asserted and the Claim that actually was made against the insured should be ignored.

C. The Facts on Which Harman Relies Do Not Change the Claim That Was Settled.

Ignoring the plaintiff's allegations and court rulings, Harman instead focuses on cherry-picked parts of the settlement papers, the settlement class definition, [redacted] as evidence supporting Harman's subjective view that the *Baum* settlement did not represent bump-up damages. This evidence does not alter the Claim that the settlement resolved.

1. Harman Does Not Dispute That the Superior Court Misapprehended the Settlement Class Definition.

Harman's focus on the settlement class definition is misguided. Harman does not dispute that the Superior Court erred in its apprehension of the *Baum* settlement class definition. Nor does Harman dispute that the Superior Court's conclusion that all shareholders were "only indirectly impacted by the inadequate consideration" was based on a mistaken factual predicate. AB at 28. Nonetheless, Harman contends that the settlement class definition still supports its position for a different reason:

that the inclusion of shareholders who sold their shares is evidence that settlement was not about inadequate consideration. *Id.* at 26.

Here too Harman is focused on the wrong consideration. The existence of hypothetical class members that sold their shares before the deal closed does not alter the meaning of the settlement. The settlement resolved allegations of only a single injury: inadequate deal consideration.

Furthermore, Harman fails to respond altogether to—and thus concedes—the Insurers' argument that the inclusion of class members that sold their shares before the deal closed does not matter because proceeds from a settlement run with the shares. OB at 40–41; *see Wilmington v. Goldstein*, 1986 WL 7990, at *2 (Del.) (concluding that because "defendant did not respond to the [statute of limitations] argument … he tacitly concedes that the complaint was timely filed").

Harman also concedes that the shareholder class action settlement was distributed on a per-share basis, but argues, without citation, that this is irrelevant because it is "routine[]." AB at 27. However, this response directly conflicts with Harman's position that a "routine" denial of liability in the settlement is conclusive proof that the settlement does not represent a bump-up in consideration. *Id.* at 8, 14. The per-share distribution of the settlement proceeds—as opposed to Harman's insistence that it is not liable—is a direct reflection of what the settlement represents to the shareholders.

2. Harman Relies on Benefits Inherent in Any Settlement.

Harman's analysis of what the *Baum* settlement represents focuses on benefits to every settling defendant which are thus unhelpful to determining what this particular settlement represents. Indeed, Harman admits that settling for a full denial of liability and agreeing to a broad settlement class is "what any prudent policyholder would do." AB at 8. Harman even specifies in the Settlement Agreement that it settled to "avoid the costs, uncertainty and risks ***inherent in any litigation***." *Id.* at 14, 30 (quoting A2230 § II) (emphasis added).

Harman does not dispute that achieving a defense-costs savings and maintaining the ability to deny liability are inherent in every settlement. Nor does Harman respond to the Insurers' argument that allowing these benefits to remove the *Baum* settlement from the scope of the Bump-Up Provision would render the term "settlement" meaningless. OB at 38–39. Courts must apply the interpretation that "gives effect to each term of an agreement" over ones that would "result in a conclusion that some terms are uselessly repetitive." *O'Brien*, 785 A.2d at 287. Despite this basic principle of contract interpretation, Harman insists on an interpretation that fails to account for each of the terms.

Further, Harman's suggestion that the settlement amount cannot represent a bump-up in consideration because it is only a fraction of the plaintiff's claimed damages is unsupported. Notably, Harman ignores plaintiff's counsel testimony that

the $28 million settlement, compared to other § 14(a) lawsuits, was a significant recovery and "the largest" such "in the history of the District of Connecticut." A3090. Moreover, the settlement was approved by the *Baum* court as reasonable. A2692 ¶ 5.

3. [redacted]

D. Attorneys' Fees Cannot Be Carved Out of the Settlement.

Finally, Harman posits that, at a minimum, the portion of the settlement fund that the ***shareholders*** used to pay their own attorneys' fees was not an effective

increase in consideration because that portion of the settlement "was never paid to or controlled by shareholders." AB at 40–42. This contention ignores how common fund fee awards function in class action settlements such as the *Baum* settlement. When a settlement comprises a common fund, the defendant pays the settlement to and for the benefit of the class members who, in turn, bear the cost of their own litigation. *See In re Orchard Enters. S'holder Litig.*, 2014 WL 4181912, at *3 (Del. Ch.) (explaining Delaware's "general rule that a party must pay its own counsel fees" and that "[w]hen the benefit takes the form of a common fund," equity demands that the plaintiff be allowed to "recover costs from the fund" to avoid unjustly enriching the other beneficiaries at her expense). In rejecting the plaintiff's argument that "only the part of the [s]ettlements that the individual shareholders actually received . . . is excluded from coverage," the *Towers Watson* court reasoned that, "[r]egardless of how the additional consideration is distributed once it is paid to the beneficiaries, it nevertheless constitutes *in toto* an increase in the consideration paid for the merger." 2024 WL 993871, at *9. Because the attorneys' fees are encompassed within the common fund, they, along with the rest of the common fund, represent an increase in consideration.

Harman's cases are inapposite. *Safeway Stores, Inc. v. National Union Fire Insurance Co. of Pittsburgh* did not involve a "bump-up exclusion," and Safeway paid plaintiffs' attorneys' fees directly as part of the settlement agreement, not out of

a common fund. 64 F.3d 1282, 1285–87 (9th Cir. 1995). Similarly, in *Ceradyne Inc. v. RLI Insurance Co.*, the court, citing *Safeway*, held that only those "defense costs" that were "directly pa[id]" by the defendant were outside the scope of the bump-up provision. 2022 WL 16735360, at *12 (C.D. Cal.)). By contrast, the settlement here confirms Harman agreed only to pay a fixed sum of $28 million dollars and expressly disavowed any "additional responsibility for [Baum and the Class's] fees, costs, or expenses." A2239. As with any common fund settlement, Harman's fixed payment obligation was not impacted by the amount of fees subsequently paid to the *Baum* plaintiff's counsel.

CONCLUSION

The judgment of the Superior Court should be reversed.

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CERTIFICATE OF SERVICE

Aaron M. Nelson, Esquire, hereby certifies that, on May 30, 2025, the foregoing *Pubic Version of Reply Brief of Appellants Illinois National Insurance Company and Federal Insurance Company* was served on all counsel of record electronically.

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