IN THE SUPREME COURT OF THE STATE OF DELAWARE

MIDVALE INDEMNITY CO., Defendant Below/ Appellant, v. AMC ENTERTAINMENT HOLDINGS, INC., Plaintiff Below/ Appellee.	No. 206, 2025 CASE BELOW: SUPERIOR COURT OF THE STATE OF DELAWARE C.A. No. N23C-05-045 MAA (CCLD) **REDACTED PUBLIC VERSION FILED ON JULY 8, 2025**

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TABLE OF CONTENTS

EXHIBITS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

NATURE OF PROCEEDINGS

This insurance coverage dispute arises from an attempt by Plaintiff Below/Appellee AMC Entertainment Holdings, Inc. ("AMC") to obtain directors and officers ("D&O") liability insurance coverage for its issuance of new stock as part of a settlement. Defendant Below/Appellant Midvale Indemnity Company ("Midvale") denied coverage for the stock issuance under an excess D&O policy. The central question presented is whether AMC's issuance of stock to its existing common shareholders constitutes a "Loss" that Midvale must "pay" "on behalf of" AMC under a D&O insurance policy.

AMC's common shareholders filed class action lawsuits in the Delaware Court of Chancery challenging AMC's decision to convert its AMC Preferred Equity Units ("APEs") to common stock, which they claimed diluted their ownership interests in AMC. To settle these actions, AMC agreed to mitigate that asserted dilution by issuing to class members one new share of common stock for every 7.5 shares that they held following a reverse stock split. Significantly, the class received no cash or other extant assets from AMC; rather, as the Chancery Court recognized, the settlement gave common shareholders "a slightly bigger slice" of AMC's equity pie "at the expense of the APE unitholders." A0751.

AMC then sought D&O coverage from its insurers, including Midvale, characterizing this reallocation of equity as some form of covered "Loss." AMC could not point to any cash payment that could constitute such Loss, as no cash changed hands. Instead, AMC contended that Midvale must pay AMC cash for AMC's issuance of new equity instruments to its own shareholders, even though the transaction had zero net impact on AMC's balance sheet.

In a February 28, 2025 opinion, the Superior Court held that (1) AMC's stock issuance constituted "Loss" under the plain language of the policy at issue, and (2) AMC satisfied its burden to establish covered Loss exceeding Midvale's attachment point. The court entered a final judgment on April 9, 2025, and Midvale filed a timely notice of appeal.

SUMMARY OF ARGUMENT

This appeal addresses whether Delaware law permits a corporation to convert its D&O insurance into a funding source for a new stock issuance—in a transaction indisputably costing the company nothing—merely because that issuance is part of a settlement. The Superior Court held that Midvale, one of AMC's D&O insurers, must provide coverage and "pay" for the stock issuance. The Superior Court erred for multiple independent reasons rooted in the unambiguous text, structure, and purpose of the relevant insurance policies.

1. The Superior Court misread the plain language of the relevant insuring agreements. "Loss" is defined to include "settlements . . . or other amounts . . . that any Insured is legally obligated to pay." The plain and ordinary meaning of a legal obligation to "pay" in this context contemplates a transfer of money; it certainly does not contemplate the creation or transfer of equity instruments. The dictionary confirms this common-sense reading. Black's Law Dictionary defines "pay" in relevant part as "[t]o transfer money that one owes to a person, company, etc." *Pay*, Black's Law Dictionary (12th ed. 2024), *available at* Westlaw. The Superior Court's interpretation impermissibly expands the policy language beyond any reasonable construction.

The structure and context of the policies similarly confirm this reading. Significantly, the policies contemplate that Midvale will pay Loss "on behalf of"

AMC. Midvale obviously cannot issue AMC's stock; as such, even if stock were Loss that could be paid, it is impossible here for Midvale to meet the Primary Policy's requirement to pay Loss *on behalf of* AMC. Additionally, the Exhaustion and Legal Tender Provision in the Midvale Excess Policy requires that underlying policy limits be paid in "legal tender," a requirement that would be nullified if the policies permitted payment in stock. Moreover, while the policies meticulously detail procedures for converting foreign currency into dollars, the policies contain no mechanism for valuing stock. Had the parties intended to cover stock issuances, they surely would have included valuation procedures at least as detailed as those for the simpler task of valuing foreign currency. The failure of the decision below to read the policy language as a whole, as Delaware law requires, resulted in an unreasonable interpretation of that policy language.

2. The Superior Court failed to analyze a second set of arguments despite acknowledging that they were vigorously briefed: Even if the relevant policies could theoretically respond to non-cash payments in other circumstances (which Midvale disputes), they cannot respond to a stock issuance like the one here. Because AMC issued new, authorized stock to existing stockholders, there was no cost to it whatsoever. Indeed, AMC's own accounting records establish that the transaction had a net impact of "zero" on its balance sheet. AMC's settlement merely reconfigured the ownership structure to address the dilution alleged by the common

shareholders. It is nothing like a cash payment, which necessarily depletes the assets of the entity that makes the payment.

Mandating insurance coverage for this cost-free transaction creates an impermissible, commercially unreasonable windfall to AMC. Every court that has addressed similar issues has reached the same conclusion, including the directly on-point decision in *Enterasys Networks, Inc. v. Gulf Insurance Co.*, 364 F. Supp. 2d 28, 31 (D.N.H. 2005), which recognized that when a corporation issues new stock to existing stockholders, it "suffers no economic harm," and providing coverage would "actually result in an inappropriate windfall for the company." The Superior Court's failure to address this authority or the fundamental economic realities of the transaction represents reversible error.

If allowed to stand, the Superior Court's interpretation would transform D&O insurance from a shield for corporate fiduciaries into a financing mechanism for corporate transactions—a result that contravenes the core purpose of D&O insurance. It would also create perverse incentives for companies to settle claims with newly-created equity and then demand cash reimbursement from their insurers, effectively turning D&O insurers into investment banks rather than indemnifiers of actual losses.

This Court has emphasized that D&O policies must be interpreted consistent with their intended purpose—to protect directors and officers—and has repeatedly reversed trial courts that improperly expanded coverage beyond the policies' text and that fundamental purpose. This case calls for reaffirmation of those principles and correction of an erroneous ruling that contravenes the language, structure, and purpose of the policies.

The Superior Court's decision fundamentally misinterprets the policies by expanding coverage far beyond what the parties contemplated in their text, producing commercially nonsensical outcomes, and undermining the availability of D&O insurance for those it was intended to protect. The judgment should be reversed.

STATEMENT OF FACTS

A. The Primary Policy and the Midvale Excess Policy

AMC purchased D&O insurance for the policy period of January 1, 2022 to January 1, 2023. A0296-A0364. Midvale issued an excess policy (the "Midvale Excess Policy"), which follows form to the primary policy (the "Primary Policy") issued by XL Specialty Insurance Company. *See* A0297, 299. The Midvale Excess Policy's attachment point is $30 million; it responds to 33% of covered Loss in excess of $30 million until an additional $15 million in covered Loss has been incurred (*i.e.*, an aggregate sum of $45 million in Loss). *See* A0297, 307-8.

Insuring Agreement B of the Primary Policy states that the Insurer "shall pay on behalf of [AMC] Loss resulting from a Claim first made against the Insured Persons during the Policy Period for a Wrongful Act to the extent [AMC] is required or permitted to pay on behalf of the Insured Persons as indemnification." A0348. Insuring Agreement C of the Primary Policy states that the Insurer "shall pay on behalf of [AMC] Loss resulting solely from any Securities Claim first made against [AMC] during the Policy Period for a Wrongful Act." A0348.

The Primary Policy defines "Loss" in relevant part, as "damages, judgments, settlements, pre-judgment and post-judgment interest or other amounts . . . that any Insured is legally obligated to pay[.]" A0351. The Primary Policy's Bump-Up Provision (on which the Superior Court relied to interpret other policy provisions notwithstanding the fact that no party contends it directly applies here) states that "Loss" does not include "any amount which represents or is substantially equivalent to an increase in the consideration paid, or proposed to be paid, by the Company in connection with its purchase of any securities or assets of any person, group of persons, or entity[.]" A0352 (the "Bump-Up Provision").

The Primary Policy includes a provision which specifies that "[a]ll . . . Loss and other amounts under this Policy are expressed and payable in the currency of the United States of America." A0361 (the "Currency Provision"). The Currency Provision further states as follows:

> If judgment is rendered, settlement is denominated or other elements of Loss are stated or incurred in a currency other than the United States of America, payment of covered Loss due under this Policy, subject to its terms, conditions and limitations, will be made either in such other currency (at the option of the Insurer and with the agreement of the Parent Company), or, in the United States of America dollars at the rate of exchange most recently published in The Wall Street Journal on the date of the Insurer's obligation to pay such Loss is established.

A0361.

The Midvale Excess Policy includes a provision which states that it does not attach until "after the insurers of the Underlying Insurance, the Insureds, any DIC Insurer, or any other source shall have paid in legal tender the full amount of the Underlying Insurance, and any applicable retention or deductible." A0299 (the "Exhaustion and Legal Tender Provision").

B. <u>AMC's Shareholder Proposals</u>

AMC operates movie theaters worldwide. *See* A1266. AMC's stock had garnered massive interest during the so-called "meme stock" craze of 2020 and 2021. A0250. In 2021, AMC sought to raise capital by issuing more shares of common stock but was approaching the authorized limit in its Certificate of Incorporation. A0251. AMC sought shareholder approval to amend its charter to authorize more shares, but AMC's efforts failed because its common shareholders—now comprised primarily of retail investors—would not vote to approve the proposals. A0251-52. Faced with this impasse, AMC devised a workaround.

AMC created APEs out of fractional interests in AMC's preferred stock, which AMC imbued with the same voting rights as common shares. A0251. The APEs also had a mirrored voting provision under which any uninstructed units would vote in proportion to the instructed units. Institutional investors purchased the APEs. A0251. AMC then scheduled a shareholder vote on two proposals. A0251-52. The first proposal would implement a reverse stock split. A0251. The second proposal would amend AMC's charter to authorize more common stock, triggering the conversion of the APEs into shares of common stock. A0251-52. The mirrored-voting provisions in the APEs effectively guaranteed the proposals would pass. A0252.

C. The Common Shareholder Action

AMC's common shareholders filed class-action lawsuits in Chancery Court against AMC and its directors and officers to prevent AMC from implementing the proposals, which they asserted would dilute their ownership interest in AMC.[1] These lawsuits were consolidated and styled *In re AMC Entertainment Holdings, Inc. Stockholder Litigation*, 299 A.3d 501 (Del. Ch. 2023) (the "Common Shareholder Action"). A0717. The common shareholders generally asserted that (1) AMC's directors and officers breached their fiduciary duties by issuing the APEs; and (2) AMC failed to provide the common stockholders with a required class vote on the creation of the APEs. A0252-53. Pursuant to a stipulation of the parties, the Chancery Court entered a status quo order preventing implementation of the proposals pending resolution. A0253.

D. AMC Issues New Shares to Its Existing Common Shareholders as Part of a Settlement

The Common Shareholder Action was resolved through a settlement. A0255. As part of the settlement, the common shareholders released their claims and allowed the proposals to pass such that new shares would be authorized, the APEs

[1] The two lawsuits are *Allegheny County Employees' Retirement System v. AMC Entertainment Holdings, Inc.*, C.A. No. 2023-0215-MTZ (Del. Ch.) (the "Allegheny Action") (A0465) and *Munoz v. Aron*, C.A. No. 2023-0216-MTZ (Del. Ch.) (the "Munoz Action") (A0605). The Munoz Action named AMC's directors and officers as defendants. The Allegheny Action also included AMC as a defendant in addition to its directors and officers.

would be converted to common stock, and a reverse stock split would take place. To offset the purported dilution from implementing the proposals, AMC agreed to issue to the common shareholders one share of common stock for every 7.5 shares of common stock held by common shareholders after the reverse stock split. A0255. The Chancery Court stated that the settlement had the "practical effect of reallocating the ownership of AMC's equity between its common stockholders and the APE unitholders." A0751. That is, "[b]ecause there is no monetary payment to the Company, the [Settlement Shares] do[] not increase the size of AMC's equity pie, but rather give[] class members a slightly bigger slice at the expense of APE unitholders." A0981.

E. <u>AMC Records the Share Issuance as a Neutral Event on Its Balance Sheet</u>

At the time the settlement was implemented, the share issuance had a net-zero impact on AMC's assets. AMC recorded a $99.3 million expense on its balance sheet as part of its accumulated deficit. A0259-60. AMC also recorded a $99.3 million increase in equity on its balance sheet in the form of additional paid-in capital and par value. A0260. Thus, AMC both added and subtracted the exact same amount from the equities section of its balance sheet. A0258-60.

F. AMC Seeks Insurance Coverage for Its Reallocation of Equity Among APE Holders and Common Shareholders

On May 4, 2023, AMC filed this lawsuit against Midvale seeking coverage for AMC's issuance of new shares to address the common shareholders' dilution concerns as part of the settlement of the Common Shareholder Action. A0117-51. AMC and Midvale cross-moved for summary judgment. On February 28, 2025, the Superior Court granted summary judgment in favor of AMC and against Midvale, finding that AMC's share issuance constituted covered "Loss" exceeding the limit of the Midvale Excess Policy.[2] Civil Mem. Op., dated February 28, 2025 (Trans. ID 75742007), Ex. A. The court entered final judgment on April 9, 2025. Order for Entry of Final Judgment Pursuant to Rule 58, dated April 9, 2025 (Trans. ID 76034287), Ex. C. Midvale filed a timely notice of appeal. A1620-24.

[2] The summary judgment opinion also addressed another issue that, by stipulation of the parties, is not raised on appeal. Joint Stip. as to Midvale's Consent Defense, dated March 9, 2025 (Trans. ID 75800941), Ex. B.

ARGUMENT

I. The Superior Court Erred in Holding That the Issuance of Stock Is a "Loss" That Midvale Must "Pay" "On Behalf Of" AMC

A. Question Presented

Whether AMC's issuance of stock as settlement consideration constitutes a "Loss" that Midvale must "pay" "on behalf of" AMC under the plain language of the Primary Policy to which the Midvale Excess Policy follows form. Midvale expressly preserved its right to appeal this issue in the joint stipulation incorporated into the final judgment (Trans. ID 75800941). Ex. B at 5; *see also* A0264-76, A1366-91, A1489-1507.

B. Scope of Review and Legal Standard

Review of all issues presented here is *de novo*. *See ConAgra Foods, Inc. v. Lexington Ins. Co*., 21 A.3d 62, 68 (Del. 2011) (noting that both the Superior Court's "grant or denial of a summary judgment motion" and "interpretation of an insurance contract" are reviewed *de novo*). In this posture, this Court "must determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *Hart v. Parker*, 236 A.3d 307, 309-10 (Del. 2020).

Under Delaware[3] law, "the proper construction of any contract, including an insurance contract, is purely a question of law." *Rhone-Poulenc Basic Chems. Co.*

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[3] Delaware courts generally apply the law of the insured's state of incorporation to D&O coverage disputes. *See RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 900-901

v. Am. Motorists Ins. Co., 616 A.2d 1192, 1195 (Del. 1992) (citation omitted). "[T]he terms of an insurance contract are to be read as a whole and given their plain and ordinary meaning." *O'Brien v. Progressive N. Ins. Co*., 785 A.2d 281, 291 (Del. 2001). "Where the language of a policy is clear and unequivocal, the parties are to be bound by its plain meaning." *ConAgra*, 21 A.3d at 69 (citation omitted). "Absent some ambiguity, Delaware courts will not destroy or twist policy language under the guise of construing it." *Rhone-Poulenc*, 616 A.2d at 1195 (citation omitted). "[T]he language at issue must be read in the context of the policy[,]" *Storns v. Federated Serv. Ins. Co*., 125 A.3d 1102, 1107 (Del. 2015), and the Court must "giv[e] sensible life to a real-world contract," taking into account "[t]he basic business relationship between [the] parties[.]" *See Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 913, 927 (Del. 2017); *see also Weinberg v. Waystar, Inc*., 294 A.3d 1039, 1046 n.27 (Del. 2023) (discussing the importance of "common sense and context" in contract interpretation); *Heartland Payment Sys., LLC v. inTEAM Assocs., LLC*, 171 A.3d 544, 557 (Del. 2017) ("Before stepping through the specific contractual provisions it is helpful to look at the transaction from a distance[.]"). Delaware courts will not interpret contracts in a way that "produces an absurd result

(Del. 2021). AMC is a Delaware corporation, and the Superior Court applied Delaware law below; no party argued that a different law should apply.

or one that no reasonable person would have accepted when entering the contract." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010).

C. <u>Merits of Argument</u>

The plain and unambiguous policy text forecloses AMC's coverage demand. As relevant here, the policies obligate Midvale to "pay" "Loss" "on behalf of" AMC in connection with a covered claim. A0348. "Loss" is further defined to include "settlements . . . or other amounts . . . that any Insured is legally obligated to pay[.]" A0351. The text, structure, and purpose of the policies confirm that these words do not encompass the issuance of stock as part of a settlement.

1. As Used in the Primary Policy, the Plain Meaning of Midvale's Obligation to "Pay" Does Not Extend to an Obligation to Issue Stock

Under settled Delaware law, undefined terms in an insurance policy are given their ordinary and usual meaning. *O'Brien*, 785 A.2d at 288. Here, the critical undefined term is the verb "pay": the policy defines "Loss" only as certain amounts an insured is "legally obligated to *pay*[,]" and the insuring agreements only require Midvale to "*pay*" such Loss "on behalf of" AMC. A0348; A0351 (emphasis added).

To confirm the plain meaning of undefined terms, "[t]his Court often looks to dictionaries[.]" *In re Solera Ins. Coverage Appeals*, 240 A.3d 1121, 1132 (Del. 2020). The relevant definition of the verb "pay" in this context is clear—"[t]o transfer money that one owes to a person, company, etc." *Pay*, Black's Law

Dictionary (12th ed. 2024), *available at* Westlaw. This definition confirms the commonsense interpretation that debts are ordinarily paid with money. Indeed, the very definition of insurance is one where an insurer "promises to make a certain payment of *money* upon the destruction or injury of something in which the other party has an interest." *Insurance*, Black's Law Dictionary (12th ed. 2024), *available at* Westlaw (emphasis added) (citation omitted). Given this commercial reality, no reasonable insurer or insured can understand the verb "pay" in this context to encompass anything other than the shifting of a monetary risk.

Understanding what it means to "pay" in insurance requires recognizing what it does not mean. In ordinary parlance, stock is not "paid"; stock is issued, bought, or sold.[4] Stock represents ownership, not currency—a fact the U.S. Supreme Court has recognized. *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 278 (2018) ("[T]he word 'money' when taken in its ordinary and grammatical sense does not include corporate stocks[.]" (citations omitted)). As the Court noted, the fact that stocks can be reduced to a "value expressible in terms of money" does not mean that stock and money are the same. *Id.* at 280 (internal quotation marks omitted). The Court illustrated this by noting that the IRS would not accept stock as payment for taxes. *Id.* at 279. AMC itself follows this principle—it does not accept stock for movie

[4] Delaware law itself recognizes this distinction: corporations "issue" stock while others can "pay" to buy it. *See* 8 *Del. C.* § 152.

tickets, nor could its customers create AMC stock to tender as payment. Similarly, given the monetary nature of insurance, no one expects their auto insurer to issue shares after a collision, their health insurer to pay surgeons in stock, or their property insurer to hand over equity certificates to rebuild a burned home. D&O insurance operates on the same principle: monetary payment for covered losses.

The Superior Court's decision sidestepped this straightforward, common-sense textual analysis. It improperly adopted an expansive interpretation of the verb "pay" that encompassed a stock issuance. *See* Ex. A at 14-15. In doing so, the court below committed reversible error by failing to give words in the contract their "plain and ordinary meaning" as Delaware law requires. The Superior Court did not identify a plausible understanding of the term in common parlance that would encompass the creation of a new equity instrument and did not consult a dictionary (which would have confirmed the court's error). Instead, the Superior Court made a blanket observation that "Delaware caselaw recognizes the close similarity between stock and cash money," ignoring the fundamental distinction between transferring existing monetary value and creating new equity interests. *Id*. at 14. The Superior Court based its reasoning on a quote from *In re Activision Blizzard, Inc. Stockholder Litigation*, 124 A.3d 1025, 1053 (Del. Ch. 2015), *as revised* (May 21, 2015), *judgment entered sub nom. In re Activision Blizzard, Inc. Stockholder Litigation*, 2015 WL 2415559 (Del. Ch. May 20, 2015). Such reliance, however, is misplaced. The quoted language appears in the court's analysis of whether restructuring-related injuries were corporate-level or stockholder-level for purposes of determining if claims were derivative or direct. The *Activision* court plainly did not intend to declare that stock was a form of legal tender or otherwise equivalent to money. Indeed, the opinion extensively discusses the unique rights that "travel[] with the shares," such as voting rights and the rights to bring a derivative suit, that have no analogue in money. *Id*. at 1045-1050. The court's observation that stock "can be exchanged for other forms of currency" merely describes the unremarkable proposition that stock can be exchanged for money, not that stock *is* money. *Id*. at 1053.

Indeed, the Superior Court's reasoning replicates the very argument that the U.S. Supreme Court rejected in *Wisconsin Central*. There, the Court considered whether items with monetary value should be treated as money and firmly dismissed the existence of any purported equivalence. The Court explained that having similarities to money does not transform stock into money, any more than "baseball cards [or] vinyl records" become money simply because they have "value expressible in terms of money." 585 U.S. at 281.

The Superior Court's decision violates the plain and ordinary meaning of the words used in the Primary Policy. It effectively nullifies the limiting function of the term "pay" by replacing it with an unbounded definition that could encompass virtually any transfer or creation of economic value. This stretches the ordinary meaning of "pay" beyond recognition to reach an absurd result that is divorced from the reality of insurance, where precise valuation and clearly defined monetary obligations are essential to the bargain between insurer and insured. By eliminating the distinction between a payment and a stock issuance, the trial court impermissibly rewrote the policy language rather than enforcing it as written, as Delaware law requires. *See, e.g.*, *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 928 (Del. 1982) ("[T]he Court should not rewrite an insurance policy nor ignore its clear and certain terms.").

2. The Policies' Structure and Context Confirm That Midvale's Obligation to "Pay" Does Not Encompass a Stock Transfer

The definition of "Loss" does not exist in a vacuum; rather, it is part of a comprehensive program of D&O insurance. This Court's prior precedents teach that Delaware courts are to look to the policy as a whole and in context to "confirm[]" the plain meaning of the pertinent terms. *In re Verizon Ins. Coverage Appeals*, 222 A.3d 566, 575 (Del. 2019). Here, reading the policy language as a coherent whole further confirms that Midvale's obligation to "pay" cannot plausibly extend to stock issuances.

a. The Superior Court's Interpretation Impermissibly Erases the Requirement for Midvale to Pay Loss "On Behalf Of" AMC in the Insuring Agreement

The Primary Policy's insuring agreements only obligate Midvale to pay Loss "on behalf of" AMC. A0348. The Superior Court acknowledged—and AMC does not dispute—that "only AMC could issue new shares" of its stock to settle the Common Shareholder Action. Ex. A at 16. Since Midvale cannot issue new AMC stock, only the normal meaning of "pay" as a monetary transfer would make sense in this context. *See Liggett Grp. Inc. v. Affiliated FM Ins. Co.*, 2001 WL 1456853, at *3 (Del. Super. Ct. Sept. 12, 2001) ("The plain meaning of 'pay on behalf of' is to disburse to a third party *money* owed by the insured." (emphasis added) (internal quotation omitted)), *aff'd sub nom. Liggett Grp., Inc. v. Ace Prop. & Cas. Ins. Co.*, 798 A.2d 1024 (Del. 2002). Yet, the Superior Court dismissed the impossibility of Midvale issuing AMC stock without acknowledging the irreconcilable conflict its interpretation creates with the plain text of the insuring agreements.[5] Far from a mere "technical [or] linguistic" quibble, as the Superior Court suggested (Ex. A at

[5] In an effort to explain how this policy language could apply to Midvale, AMC offered the preposterous suggestion below that Midvale could have "gone out into the marketplace [and] purchased the shares" to satisfy this obligation. A1522. AMC's suggestion demonstrates the commercial unreasonableness—and sheer absurdity—of its reading of the policies. It would transform insurers into part-time stock brokers, and it is not even clear that AMC's proposed approach would be legal given the regulatory environment in which insurance companies operate. While the Superior Court did not adopt AMC's analysis, it also did not offer any alternative.

17), this issue implicates a fundamental structural constraint that defines the limits of what Midvale can possibly "pay" on behalf of AMC. The sole authority cited by the Superior Court to support its conclusion, *Sycamore Partners Management, L.P. v. Endurance American Insurance Co.*, 2021 WL 4130631, at *19 (Del. Super. Sept. 10, 2021), actually supports precisely the opposite proposition. *Sycamore* held that, when a policy requires that an insurer pay monetary amounts "on behalf of" an insured, the insurer *is* obligated to make payment on behalf of the insured even if it would prefer the insured pay first and then reimburse the insured. *Id*. The *Sycamore* decision enforces the policy language, the Superior Court's decision erases it.

b. The Superior Court's Decision Artificially Isolated Additional Provisions That Collectively Contemplate a Monetary Payment Structure

The Superior Court plainly erred by dismissing key provisions elsewhere in the Primary Policy and Midvale Excess Policy that reinforce the monetary nature of Midvale's payment obligations. The Currency Provision states that "Loss and other amounts under this Policy are expressed and payable in the currency of the United States of America," and provides detailed instructions for converting foreign currency to U.S. dollars based on published exchange rates. A0371. Along similar lines, the Midvale Excess Policy's Exhaustion and Legal Tender Provision requires that the "full amount" of the underlying limit be paid in "legal tender." A0309.

Rather than reading these provisions as integral parts of a coherent whole, the Superior Court artificially isolated them. The Superior Court's decision failed to draw the obvious connection between the Loss definition and the Currency Provision. "Loss" is defined as "damages, judgments, settlements, pre-judgment and post-judgment interest or other amounts . . . that any Insured is legally obligated to pay[.]" A0351. The Currency Provision provides that "Loss and other amounts" are payable in U.S. currency. A0361. Thus, even if the Loss definition could encompass an "amount" of stock that Midvale was obligated pay on AMC's behalf (which is dubious for the reasons discussed *inter alia*) such "amount" would have to be expressed in U.S. currency. That makes no sense in the context of a new equity issuance that was expressed in the underlying settlement as a share ratio and not a dollar value. A0255. The Currency Provision, read together with the Loss definition confirm that "Loss" cannot encompass an "amount" of newly-issued shares.

Instead, the decision below summarily dismissed the Currency Provision as reflecting the parties' purported "awareness" that Loss payments may come in "many forms[.]" Ex. A at 16. In fact, the Currency Provision reflects that Loss may come in only one form—currency, whether U.S. or foreign. There is no reference to any other "form[]" of Loss in the Currency Provision. Just as telling is the conspicuous absence of any mechanism for valuing stock. This is not a minor omission; it is compelling evidence that the parties never contemplated extending coverage to stock issuances. It defies belief that sophisticated commercial parties would meticulously detail procedures for converting foreign currency into U.S. dollars while leaving the far more complex task of stock valuation unaddressed. The share issuance here is illustrative. There are a number of ways in which the shares could be valued, and AMC did not even tell Midvale how AMC itself valued the shares it issued as part of the settlement until April 11, 2024, as part of this coverage action and long after any purported payment on behalf of AMC would have been due. A0165.

The Superior Court's decision dispensed with the Exhaustion and Legal Tender Provision in a terse footnote as merely affecting "attachment points for excess coverage." Ex. A at 17 n.87. The attachment point of the Midvale Excess Policy is not a triviality: it fundamentally defines when Midvale has an obligation to pay, and it cannot be reached if a payment is made in something that is not "legal tender." It is undisputed that stock is not legal tender, and therefore any purported "payment" in shares cannot exhaust the applicable underlying insurance. It would be absurd to imagine that AMC purchased an integrated insurance program that covered stock issuances while simultaneously providing that the Midvale Excess Policy's limits could not be reached in the event of a stock issuance, and such an "absurd" interpretation is impermissible under Delaware law. *Nassau Gallery, Inc. v. Nationwide Mut. Fire Ins. Co.*, 2003 WL 21223843, at *3 (Del. Super. Ct. Apr.

17, 2003) (holding that the court's interpretation of policy provisions cannot "create an 'absurd' result" (citation omitted)); *see also Sycamore*, 2021 WL 4130631, at *24 ("[T]he meaning accorded one portion of an agreement cannot control the meaning of the entire agreement in a way that contradicts the agreement's overall scheme and plan."). The sole interpretation that avoids creating an internal contradiction between the underlying primary coverage and Midvale's excess layer is one that gives the obligation to "pay" its ordinary meaning throughout: the transfer of money.

The Superior Court decision's siloed approach violates the fundamental principle that insurance policies must be read as a whole. When read together, these provisions paint a clear picture of an insurance program that operates exclusively with money. By treating these provisions as mere technicalities, the Superior Court improperly rewrote the policies to cover transactions not encompassed within their integrated structure.

c. If Relevant at All, the Bump-Up Provision's Structure Actually Undermines the Superior Court's Interpretation

Instead of focusing on the relevant policy provisions, the Superior Court's decision erroneously relied on the Bump-Up Provision to support its expansive interpretation of the word "pay."[6] Ex. A at 15. The Bump-Up Provision states that

[6] The Superior Court never should have considered AMC's arguments regarding the Bump-Up Provision in the first place. AMC raised these arguments for the first time at oral argument notwithstanding that there were six briefs totaling more than 48,000

"Loss" does not include "any amount which represents or is substantially equivalent to an increase in the consideration paid, or proposed to be paid, by the Company in connection with its purchase of any securities or assets of any person, group of persons, or entity[.]" A0352; Ex. A at 15. No party contends that the Bump-Up Provision applies directly to the case at bar. Rather, the Superior Court determined that the Bump-Up Provision should guide the interpretation of the insuring agreements and "Loss" definition because it uses a form of the word "pay." Ex. A at 15. The Superior Court reasoned that the word "pay" must have the same meaning as elsewhere in the Primary Policy. *Id.* The Superior Court then relied on the Bump-Up Provision's reference to other types of non-cash consideration to conclude that "pay" must include such consideration. *Id.*

The Superior Court's logic is faulty and its reliance on the Bump-Up Provision is misplaced for several reasons. *First*, to the extent the Bump-Up Provision is relevant at all, the Superior Court's analysis should have focused on the ordinary meaning of the word "pay" *in the context of the Bump-Up Provision*. *O'Brien*, 785

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words and a mountain of supporting exhibits. The argument should have been deemed waived, and this Court should not consider it here for that reason alone. *See, e.g.*, *In re Mindbody, Inc., S'holder Litig.*, 332 A.3d 349, 408 (Del. 2024) ("Issues not briefed are deemed waived." (citation omitted)); *Matrix Parent, Inc. v. Audax Mgmt. Co., LLC*, 319 A.3d 909, 932 n.198 (Del. Super. Ct. 2024) ("It is well-settled that '[i]ssues not addressed in briefing, and raised for the first time during oral argument, are deemed waived.'" (citation omitted)); *CRE Niagara Hldgs., LLC v. Resorts Grp., Inc.*, 2021 WL 2110769, at *6 n.86 (Del. Super. Ct. May 25, 2021) (similar).

A.2d at 291. While "the same phrase should be given the same meaning when it is used in different places in the same contract," that is only required "[a]bsent anything indicating a contrary intent." *Comerica Bank v. Glob. Payments Direct, Inc*., 2014 WL 3567610, at *11 (Del. Ch. July 21, 2014) (collecting cases). The verb "pay" obviously can be used in contexts outside the scope of an insurer's indemnity obligation—such as paying one's respects at a funeral—but that is not the normal meaning. The full text of the Bump-Up Provision demonstrates that a different meaning of "pay" was intended than the other uses of "pay" in the Insuring Agreements of the Primary Policy, which all refer to a Loss that Midvale is required to pay on behalf of an insured.

Second, the Superior Court's decision also disregards the "cardinal rule" of contract construction: "where possible, a court should give effect to all contract provisions." *E.I. du Pont de Nemours & Co. v. Shell Oil Co*., 498 A.2d 1108, 1114 (Del. 1985) (citation omitted). If "pay" inherently included non-cash consideration, the Bump-Up Provision's specific references to "*consideration* paid" and "substantially equivalent to" would become meaningless surplusage.[7] A0352. By

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[7] The Superior Court's reliance on the Bump-Up Provision is particularly puzzling because the exclusion's very structure presupposes that "consideration paid" for an acquisition is not covered to begin with. By excluding only amounts "substantially equivalent to" consideration paid—rather than the consideration itself—the provision tacitly acknowledges what should be obvious: that merger consideration itself is not "Loss" in the first place. A0352. This pattern of excluding ancillary monetary amounts but not inherently non-covered principal amounts repeats

contrast, the insuring agreements and "Loss" definition include no such language. This omission confirms that the parties intended the present-tense "pay" to carry its traditional monetary meaning in the relevant context. Thus, the Superior Court erred in relying on the Bump-Up Provision, although, to the extent it is relevant, that provision bolsters Midvale's reading of the relevant policy language.

3. The Superior Court's Ruling Transforms D&O Insurance from a Shield for Corporate Fiduciaries into a Financing Mechanism for Corporate Transactions

D&O policies serve a specific and crucial function in corporate governance: protecting individual directors and officers from personal liability for alleged wrongdoing in their corporate capacities. *RSUI Indem. Co.*, 248 A.3d at 900 (noting that companies "purchase D&O policies to protect [their directors and officers] even where indemnification is unavailable"). Because directors and officers cannot and do not have an obligation to issue stock, the Superior Court's improper stretching of D&O coverage to apply to newly-issued stock does not redound to their benefit. Such an issuance can benefit only the corporate entity—creating a windfall for the

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elsewhere in the Primary Policy: for instance, while the policy carves out "costs incurred . . . to comply with" agreements for non-monetary relief, it nowhere excepts non-monetary relief itself—a drafting choice that would be inexplicable if non-monetary relief itself were Loss, and which similarly confirms that non-monetary relief, like stock transfers, is not Loss in the first place. A0351. Reading the Bump-Up Provision in the context of the Primary Policy as a whole further confirms the fundamental error in the Superior Court's interpretation.

company while depleting coverage otherwise available to individual directors and officers.

The Superior Court's ruling would incentivize companies facing claims to liquidate their D&O insurance by settling with stock, leaving directors and officers exposed in the event of another claim where the company was no longer permitted or able to indemnify them (*i.e.*, the core protection afforded by D&O insurance). Moreover, under AMC's reasoning, directors and officers might be forced to accept stock instead of cash as "indemnification" for their personal liabilities. Alternatively, plaintiffs' counsel could become emboldened to insist that directors and officers engage in open-market stock transactions, precisely the absurd scenario AMC suggested Midvale undertake here. The uncertainty created by such a precedent would hinder Delaware corporations' ability to attract and retain qualified directors and officers, who depend on predictable, cash-based protection from personal liability.

The Superior Court's expansive interpretation thus contradicts both the explicit policy language and the fundamental purpose of D&O insurance, threatening to convert a fiduciary shield into a corporate financing tool—with the unintended consequence of limiting protections for directors and officers. Over the course of the past decade, this Court has repeatedly reversed trial courts that have similarly expanded coverage under D&O policies in a manner that improperly extended it beyond its intended scope to losses for which an individual director and officer cannot be liable. *See, e.g., In re Solera Ins. Coverage Appeals*, 240 A.3d at 1138 (finding an appraisal action not to involve a violation of law regulating securities so as to constitute a Securities Claim); *In re Verizon Ins. Coverage Appeals*, 222 A.3d at 574 (finding fiduciary duty, promoter, unlawful distribution of dividends, and fraudulent transfer and avoidance claims not to constitute Securities Claims against entity because they did not allege violation of a law regulating securities, did not arise from a purchase or sale of securities, and were not brought by a security holder); *In re FairPoint Ins. Coverage Appeals*, 311 A.3d 760, 771 (Del. 2023) (finding fraudulent transfer claims not to constitute Securities Claims against entity because they were brought in bankruptcy), *as revised* (Dec. 19, 2023); *see also Jarden, LLC v. ACE Am. Ins. Co*., 273 A.3d 752 (Del. 2022), *aff'g,* 2021 WL 3280495, at *7 (Del. Super. July 30, 2021) (finding no coverage for an appraisal action because it was not a Claim for a Wrongful Act). In each case, this Court protected the integrity and intended function of D&O coverage against attempts to repurpose it for corporate rather than fiduciary benefit. This Court should do so here too.

II. The Superior Court Erred by Ignoring That Issuing New Stock to Existing Shareholders Cost AMC Nothing and Thus Was Not a "Loss" That Could Exhaust the Midvale Excess Policy

A. Question Presented

Whether AMC's issuance of new stock to existing stockholders—a transaction with zero net impact on AMC's balance sheet—constitutes a covered "Loss" in an amount sufficient to exhaust the Midvale Excess Policy. Midvale expressly preserved its right to appeal this issue in the joint stipulation incorporated into the final judgment (Trans. ID 75800941). Ex. B at 5; *see also* A0264-76, A1366-91, A1489-1507.

B. Standard of Review

Review of these issues is *de novo*, applying Delaware law. *See supra* 15.

C. Merits of the Argument

The Superior Court ignored the economic reality that AMC's stock issuance was an equity reallocation that cost AMC nothing. Thus, even assuming *arguendo* that the Midvale Excess Policy could respond to the transfer of stock in other circumstances, here, AMC did not incur Loss reaching Midvale's attachment point. The Superior Court acknowledged that "[b]oth sides devoted substantial energy arguing over" this issue, yet its decision did not consider any of these arguments. Ex. A at 17. Rather, the Superior Court's decision simply treated all stock as "similar[to] cash money" without addressing the crucial economic difference between transferring existing value versus creating new ownership rights. *Id.* at 14.

The decision's afterthought-like treatment of the parties' extensive arguments on this issue constitutes error because these arguments are independently dispositive, as is recognized by case law squarely supporting Midvale's position. The text, structure, and purpose of the Primary Policy and Midvale Excess Policy, combined with case law arising in near-identical circumstances and the undisputed facts regarding the nature of the settlement, confirm that AMC cannot tap its D&O insurance to secure a windfall simply because it transferred ownership of its own stock from one set of owners to another.

1. Even Under the Most Expansive Definition of the Verb "Pay," the Creation of New Ownership Rights Cannot Constitute Payment Because It Transfers No Existing Value

As discussed *supra*, the policy language does not contemplate that Midvale may be called upon to "pay" settlement consideration in the form of AMC stock. But even assuming *arguendo* that "pay," as used in the Primary Policy's insuring agreements and associated "Loss" definition, could encompass transfers of existing non-monetary assets, it cannot plausibly extend to the redistribution of ownership rights created by AMC's issuance of new equity. The ordinary meaning of "pay" requires the payor to relinquish something of existing value and suffer a corresponding depletion of assets. This interpretation is confirmed by the use of that verb in the defined term "Loss," the very label of which inherently suggests that something of value would be lost. To shift the risk to an insurer to "pay" for a "Loss" where no risk or value actually shifted is a *non sequitur*—where no one was obligated to give up anything, there was no obligation to "pay" in the first place.

When AMC issued new shares of its own stock to existing holders, it created new ownership interests at no cost to it. To be sure, those ownership interests had value *to their recipients*, but AMC departed with no value in making them. This scenario is economically analogous to a stock split. When a corporation executes a stock split, shareholders receive additional shares, but the corporation does not transfer existing assets. In a stock split, the company is not paying its shareholders; rather, it is merely reconfiguring ownership rights in the company without parting with anything of value. So too here.

The Superior Court's conclusion to the contrary contains a glaring analytical gap. After concluding that stock can be "paid," the court simply declared that AMC's issuance exceeded Midvale's $30-million attachment point—without explaining how a transaction with admittedly no out-of-pocket cost to AMC could generate millions of dollars in insurance coverage. The court's only explanation was that "'Loss' occurs anytime AMC makes a covered payment." Ex. A at 17. This reasoning is circular and proves too much. Missing entirely is any nexus between what AMC expended (nothing) and what it claims from Midvale (millions of dollars)—an analytical void that would allow insureds to demand any sum of money for any stock issuance.

Whether one takes the view that there was nothing to "pay" at all, or whether any "Loss" required to be paid is valued at $0 and is therefore nonexistent, AMC cannot tap excess insurance for a transaction that had no cost to it or any other party.

2. The Same Structural Features of the Policies That Undermine the Superior Court's Stated Reasoning as to Stock Settlements Apply Even More Forcefully to a Stock Issuance That Cost AMC Nothing to Issue

The same structural features discussed *supra* confirming that the policies do not cover stock settlements apply with even greater force to settlements involving newly-issued stock distributed to existing stockholders that cost AMC nothing to issue. The insuring agreements' core obligation requires Midvale to "pay" covered Loss "on behalf of" AMC. The phrase "on behalf of" signifies that the insurer steps into the shoes of the insured, substituting its assets for those the insured would otherwise transfer. As discussed *supra*, Midvale cannot issue new AMC stock, but AMC obviously can. This reinforces that the Primary Policy's structural feature that "Loss" be paid "on behalf of AMC"—an action that Midvale physically cannot perform—forecloses coverage for a new share *issuance*. Had the parties intended coverage for newly created equity, they would have structured the insuring agreements differently, accounting explicitly for the obvious impossibility of an insurer issuing shares in a company it does not own. The Superior Court's decision offers no guidance as to how Midvale can be contractually obligated to perform an act the Primary Policy neither requires nor contemplates.

3. AMC's Balance Sheet and the Chancery Court's Underlying Opinion Conclusively Demonstrate That AMC Suffered No Insurable Economic Harm from the Stock Issuance

AMC's accounting for the newly created shares as part of the settlement conclusively demonstrates that it suffered no economic harm. The fundamental accounting equation, illustrated by the balance sheet, is Assets = Liabilities + Equities. At the time of the share issuance, AMC subtracted a $99.3 million expense from equities (in the form of accumulated deficit) while simultaneously adding $99.3 million to equities (in the form of par value and additional paid-in capital). A0259-60. AMC itself characterized these entries as "offsetting" and described its accounting treatment as having a "net impact" of "zero" on its balance sheet, effectively conceding that it suffered no economic harm from the issuance.[8] A0260.

AMC's accounting illustrates a fundamental economic truth: when a corporation issues new shares to existing shareholders, its "asset-pie remains the same, there are just more (and smaller) slices." *Enterasys*, 364 F. Supp. 2d at 31 (holding that settlement involving newly issued shares to existing stockholders was not covered under D&O policy as a matter of law). As the Court of Chancery recognized in the Common Shareholder Action, the settlement "does not increase the size of AMC's equity pie, but rather gives class members a slightly bigger slice

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[8] If anything, AMC arguably received a *benefit* in that it was no longer constrained in its ability to issue new stock. Because of the settlement, AMC could and did issue additional new shares, which it sold on the market.

at the expense of APE unitholders." A0981. In other words, AMC extinguished a potential liability without diminishing its assets or economic value. Thus, there is nothing for Midvale to "pay" here, and the Midvale Excess Policy has not been implicated, much less exceeded.

4. The Superior Court's Reasoning Would Give Insureds an Impermissible Windfall and Is Contrary to All Other Judicial Decisions That Have Considered This Issue

Courts have always understood that insurance is a hedge against the risk of fortuitous loss and not a means for the insured to secure a windfall. The Superior Court's decision throws that understanding out the window and turns the concept of insurance on its head.

Insurance exists for a specific purpose: to indemnify actual financial losses "arising from an unknown or contingent event." 44 C.J.S. Insurance § 1 (2025); *see Appalachian Ins. Co. v. Liberty Mut. Ins. Co*., 676 F.2d 56, 63 (3d Cir. 1982) ("[T]he purpose of insurance is to protect insureds against unknown risks."); *Int'l Fid. Ins. Co. v. Delmarva Sys. Corp.*, 2001 WL 541469, at *6 (Del. Super. Ct. May 9, 2001) (describing purpose of insurance as not to provide insureds with "commercial advantages by purchasing policies, but instead [to provide] protection against calamity"). Consistent with this foundational point, Delaware law defines "Insurance" as "a contract whereby one undertakes to pay or indemnify another as to loss from certain specified contingencies or perils, called 'risks,' or to pay or grant a specified amount or determinable benefit in connection with ascertainable risk contingencies or to act as surety." 18 *Del. C.* § 102. A lawsuit from AMC's common shareholders seeking monetary damages is the kind of risk that insurance acts as a hedge against. AMC's voluntary decision to settle that litigation by creating new equity instead of paying money constitutes a business decision, not the realization of any "specified contingenc[y] or peril[]" that insurance exists to protect against. *Id.*; c*f. Md. Cas. Co. v. Armco, Inc.*, 822 F.2d 1348, 1353 (4th Cir. 1987) (holding that insurance is not intended to cover amounts that "are subject to the discretion of the insured," but rather responds to "damages arising from actual, tangible injury").

The text and structure of the policies reflect this basic purpose. Delaware courts have not hesitated to interpret insurance contracts consistent with fundamental insurance principles, regardless of whether those principles might favor the insured or insurer in a given case. For example, Delaware courts have applied the concept of fortuity to hold that there was no coverage because claimed loss was not a "known loss." *See, e.g.*, *Nat'l Union Fire Ins. Co. of Pittsburgh v. Rhone-Poulenc Basic Chems. Co.*, 1992 WL 22690, at *17 (Del. Super. Ct. Jan. 16, 1992), *aff'd,* 616 A.2d 1192 (Del. 1992). These foundational principles dictate that insurance is not intended to finance intentional corporate actions that impose no economic cost on the insured. To do so would provide a windfall to insureds—a result that numerous courts, including this one, have repeatedly recognized is commercially unreasonable and impermissible. *See, e.g.*, *AT&T Corp. v. Clarendon Am. Ins. Co*., 931 A.2d 409, 419 n.24 (Del. 2007) (allowing the insured to recover where insurance proceeds would *not* constitute a windfall); *Olde Colonial Vill. Condo. Council v. Millers Mut. Ins. Co*., 2002 WL 122885, at **6-7 (Del. Super. Ct. Jan. 28, 2002) (finding the insured was only entitled to coverage for the costs to restore the building to its *status quo ante*); *O'Brien v. Progressive N. Ins. Co*., 2000 WL 33113833, at *4 (Del. Super. Dec. 18, 2000) (finding that auto policy only provided coverage for "amount necessary to repair or replace" the vehicle), *aff'd*, 785 A.2d 281 (Del. 2001).

Consistent with these principles, all courts considering whether new stock issued to existing stockholders of the corporation is covered under D&O insurance policies have held that it is not. *See Enterasys*, 364 F. Supp. 2d at 31; Hearing Tr., *Interpublic Grp. of Cos., Inc. v. Lumbermens Mut. Cas. Co.*, No. 06CV751-AKH (S.D.N.Y. Dec. 6, 2006), A1342-46. Despite extensive briefing below, the Superior Court ignored this unanimous precedent that directly contradicts its holding. It is hard to imagine a case more squarely on point than *Enterasys*, which held that a stock component of a settlement was not a covered loss under a D&O policy. The *Enterasys* court recognized that when a corporation issues new stock to existing stockholders, it "[does] not suffer any harm, economic or otherwise," and providing coverage would "actually result in an inappropriate windfall for the company." 364 F. Supp. 2d at 31-32. The court further reasoned that allowing coverage in such circumstances would create an "irresistible incentive" for companies to settle with newly issued stock "that costs the company very little beyond paper and ink to issue, but which would amount to a guaranteed source of new capital and resolution of a potential liability." *Id.* at 31. Similarly, in *Interpublic*, the court found that purported accounting losses associated with a share issuance were not reimbursable under a D&O insurance policy. A1344. The *Interpublic* court rejected the argument advanced by AMC here that an accounting expense could be a covered loss absent an outlay of cash by the insured.[9] A1344.

If allowed to stand, the Superior Court's ruling would invite mischief by creating precisely the problematic incentive of which the *Enterasys* court warned.

[9] In *Interpublic*, the court denied both parties' summary judgment motions. However, the insured in *Interpublic* had introduced evidence suggesting the possibility of lost opportunity under the specific circumstances of the case, which were unusual and unlike the present case. A1342. AMC has introduced no evidence of this sort beyond pure speculation regarding other hypothetical ways that AMC could have resolved the Common Shareholder Action. Such speculation cannot support lost opportunity damages. *See, e.g.*, *In re Fuqua Indus., Inc.*, 2005 WL 1138744, at *8 (Del. Ch. May 6, 2005) (finding claimed lost opportunity damages to be overly speculative); *Manzo v. Rite Aid Corp.*, 2002 WL 31926606, at *5 (Del. Ch. Dec. 19, 2002) (finding lost opportunity not "cognizable" where it was overly speculative), *aff'd,* 825 A.2d 239 (Del. 2003). Moreover, AMC has never argued that it incurred direct costs in connection with the stock issuance—presumably because such costs were *de minimis* "paper and ink" costs, *Enterasys*, 364 F. Supp. 2d at 31-32, or because the Primary Policy's carve-out for "costs . . . to comply with . . . any agreement to provide [non-monetary] relief" would bar recovery, A0361. The absence of any such claim—combined with the fact that AMC's entire claim for monetary Loss, including defense costs, was only [redacted] (far from Midvale's attachment point)—forecloses any need for remand on damages issues. A1553.

Companies facing litigation would be encouraged to settle claims with newly created equity—costing them essentially nothing—and then demand cash reimbursement from their insurers. This would effectively transform D&O insurers into investment banks, requiring them to "underwrite a new stock placement," *Enterasys*, at 31, rather than serve their intended function of indemnifying actual losses.[10] If insurers had to cover such losses, it would create significant unpredictability; coverage disputes would devolve into expert valuation battles that would burden Delaware courts, creating costly and intractable disputes. That would only be the beginning. Every settlement has non-monetary consideration of some kind (*e.g.*, confidentiality provisions, releases, *etc.*). Would insurers have to cover that too? What discount rate, market proxy, or actuarial table could even quantify the "price" of a confidentiality clause? Moreover, companies would be incentivized to settle with all manner of other non-cash consideration, which would further exacerbate these problems. For example, if a settlement delivered lifetime VIP passes and unlimited concession credits to AMC patrons, would Midvale be required to litigate whether a "bottomless popcorn" perk is a $3 add-on or a $300 luxury?

Holding that D&O insurance could respond to a non-monetary transfer, with no corresponding valuation mechanism, would invite this endless cascade of

[10] Theoretically, companies could even issue shares as part of a stock split in a settlement and then demand that their insurance carriers pay the actual value of those shares.

valuation disputes. But the Superior Court's decision is even worse in reality than what these hypothetical examples contemplate. The Superior Court's decision did not just move the goalposts—it removed the scoreboard. The court declared the stock component of the settlement covered without assigning any dollar value at all, even in the face of undisputed evidence that the net impact of the settlement on AMC's books was "zero." In so doing, it handed AMC a blank check drafted on Midvale's policy limits, untethered to any objective measure of "Loss." No insurer can price, reserve, or adjust claims against an obligation whose magnitude is defined only by the *ipse dixit* of the insured. Delaware law demands certainty, and the Superior Court's ruling invites chaos. Correcting the ruling would maintain the clarity and consistency upon which insurers, corporations, and courts in Delaware all rely.

CONCLUSION

For any or all of these reasons, this Court should reverse the Superior Court's erroneous decision below and enter judgment in favor of Midvale.

Respectfully submitted,

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