IN THE SUPREME COURT OF THE STATE OF DELAWARE

MIDVALE INDEMNITY CO.,	
Defendant Below/ Appellant,	No. 206, 2025
v.	CASE BELOW:
AMC ENTERTAINMENT HOLDINGS, INC.,	SUPERIOR COURT OF THE STATE OF DELAWARE C.A. No. N23C-05-045 MAA (CCLD)
Plaintiff Below/ Appellee.	PUBLIC VERSION FILED AUGUST 25, 2025

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TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This is a simple case. AMC paid nothing and wants millions. That violates the insurance contract under which Midvale promised to "pay" covered Loss, not fund windfalls from costless stock issuances.

AMC settled the underlying litigation by creating new shares at no cost to itself. The Chancery Court found the equity transfer burdened APE holders, not AMC. AMC's own accounting shows what it called a "***zero***" net impact on assets: it added and subtracted $99.3 million from its balance sheet. Yet AMC claims a $99.3 million Loss from this paper shuffle.

The Policies' text squarely forecloses AMC's gambit. The Policies require Midvale to "pay" "Loss" "on behalf of" AMC. Even setting aside other terms providing that only monetary payments are covered, Midvale cannot issue AMC's stock—a structural impossibility that alone defeats AMC's position. AMC's sole response is to claim, wrongly, that it can ignore the words in the insuring agreement. Delaware law does not excise inconvenient words from insurance policies. It enforces them as written.

The only judicial opinion to confront a settlement like the one at issue here under a D&O policy, *Enterasys Networks, Inc. v. Gulf Insurance Co*., 364 F.Supp.2d 28, 29-30 (D.N.H. 2005), rejected coverage. *Enterasys* recognized that corporations suffer no "Loss" when they are obligated to pay nothing, and its reasoning is on all fours here. AMC does not meaningfully engage with that reasoning and simply asks this Court to discard it.

Enterasys, presciently, also recognized the "irresistible incentives" a ruling for AMC would unleash. Corporations could settle with newly-issued shares, suffer no economic harm, and raid their D&O tower for cash. Those whom D&O insurance is intended to protect—directors and officers—would pay (through higher premiums and reduced available coverage) while sophisticated players game the system.

Insurance exists to indemnify insureds, not enrich them. AMC bore no economic burden and depleted no assets. This Court should not permit AMC to extract millions to "pay" a purported "Loss" when AMC was legally obligated to pay nothing and to lose nothing. The judgment should be reversed.

ARGUMENT

I. THE POLICIES DO NOT CONTEMPLATE COVERAGE FOR A STOCK ISSUANCE

AMC's arguments are contrary to well-established principles of contract interpretation and common-sense understandings of the operative words in context.

A. The Policies Afford Coverage Only for Settlements That AMC is Legally Obligated to Pay.

The Primary Policy requires that Midvale "pay" covered Loss, defined as "settlements…or other amounts…that any Insured is legally obligated to pay[.]" A0351. AMC fixates on "settlements" while ignoring the rest of the definition. Its tortured reading violates fundamental rules of grammar and contractual interpretation; AMC cannot delete the requirement that settlements be "amounts" the insured is "legally obligated to pay" simply because those words prove inconvenient. A0351.

The definition of "Loss" lists numerous monetary obligations, such as "damages," "interest," and "settlements," then includes a catchall phrase, "or other amounts that [AMC] is legally obligated to pay." A0351. The catchall defines the scope of the previous items in the list—they all represent "amounts" that AMC is "legally obligated to pay." *Terrell v. Kiromic Biopharma, Inc.*, 2024 WL 370040, at *6 (Del. Ch. Jan. 31, 2024) (holding that the "grammatical context" and syntax of the phrase "A, B, or other C" supports the conclusion "that A must fall within the class C."). To hold otherwise would impermissibly render "other" mere surplusage.

AMC erroneously invokes the rule of the last antecedent, which has no application when the syntax involves "a parallel series of nouns or verbs." *ECB USA, Inc. v. Chubb Ins. Co. of New Jersey*, 113 F.4th 1312, 1323 (11th Cir. 2024). Rather, under conventional rules of grammar, "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series," a modifier at the end of the list "normally applies to the entire series." *Facebook, Inc. v. Duguid*, 592 U.S. 395, 402 (2021) (citation omitted). The "Loss" definition has all the indicia of a parallel list: it is a list of nouns separated only by commas, with no additional prepositions or articles in the middle of the list. *See ECB*, 113 F.4th at 1324. Thus, the rule of the last antecedent has no bearing here.

The rules of grammar reflect "common sense" and give effect to the Loss definition as a whole. *See, e.g., Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1046 n.27 (Del. 2023) (describing importance of common sense in contract interpretation). Under AMC's reading, any "settlement," regardless of AMC's legal obligation to pay it, would be covered, and the "legally obligated to pay" language would be confined only to "other amounts." This is inconsistent with ordinary usage and plainly not what was intended.

Because applying "legally obligated to pay" across the entire Loss definition "makes far more sense in context" and "grammatically applies best here," "that is the plain meaning of the contract's language." *ECB*, 113 F.4th at 1325-26. Thus, AMC must "pay," as that term is meant here, in order to satisfy the "Loss" definition.

B. Under the Policies, One Cannot "Pay" by Issuing Stock.

1. This Court Must Define Words According to Their Meaning in Context.

In ordinary usage, to "pay" does not involve issuing new equity. *See* Midvale Opening Brief ("OB"), 31; *see also Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 278 (2018) ("When was the last time you heard a friend say his new car cost '2,450 shares of Microsoft'?"). AMC tries to evade this obvious conclusion by citing dictionary definitions from outside "the insurance context." AMC Answering Brief ("AB"), 23. However, it is unremarkable that "pay" in other contexts does not *always* involve money. Competing dictionary definitions alone do not create ambiguity. *See Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 740 (Del. 2006) (holding that while "[t]here may be more than one dictionary definition," the court must apply the appropriate term "in the context of the contract language and circumstances").

This Court's treatment of serial dictionary arguments in *In re Verizon Insurance Coverage Appeals*, 222 A.3d 566, 577-80 (Del. 2019), is dispositive. When the policyholder proffered alternative definitions of common terms, the Court rejected each because the definitions were "inconsistent" with how the terms were used in the policy "when read as a whole." *Id.* at 578-80 (rejecting interpretation that would transform "rules…regulating securities" into any common law principle that might touch a securities transaction). Similarly, in *Stoms v. Federated Service Insurance Co.*, 125 A.3d 1102, 1107 (Del. 2015), the policy afforded coverage to "directors" of the corporation. *Id*. at 1103. Citing a dictionary definition, the person seeking coverage argued that her decedent, a finance manager, was a "director" because "he had managerial duties." *Id.* at 1107. This Court rejected that expansive reading, focusing instead on context clues showing the policy covered only corporate directors and officers—not anyone who might "direct" others in the colloquial sense. *See id.* at 1107, 1108 n.26. The same principle applies here: AMC cannot use abstract definitions of "pay" to override the specific context in an insurance policy. As discussed below, that context does not contemplate coverage for a stock issuance.

2. Context Confirms Midvale's Reading.

a) The "Pay On Behalf Of" Requirement Forecloses Coverage for Stock Issuances.

AMC pretends that the Insuring Agreements' requirement that Midvale pay Loss "on behalf of" AMC (A0348) is merely about the sequence of payment. AB, 29. AMC misses the significance of this language entirely: this requirement illuminates the definition of "pay" in this context. Since Midvale cannot issue AMC stock on AMC's behalf, "pay" was clearly intended to carry its normal meaning in the insurance context, referring to a monetary transfer. OB, 15.

Sycamore Partners Management., L.P. v. Endurance American Insurance Co., 2021 WL 4130631, at *1 (Del. Super. Sept. 10, 2021), and *AT&T Corp. v. Clarendon American Insurance Co.*, 931 A.2d 409, 414 (Del. 2007), do not support ignoring the policy language. In both cases, the insureds sought coverage for monetary payments—the only dispute was whether the insureds had to pay first. The respective courts found that the insureds did not have to pay first because the policy language contemplated that the *insurer* must pay Loss on behalf of the insureds, regardless of who paid first.

The cases cited by AMC as examples of corporations using stock as compensation in certain instances collapse against the structural impossibility inherent in the Policy's requirement that Midvale be able to make the payment "on behalf of" AMC. *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1249 (Del. 2012), involved an "agree[ment] to pay" new shares in a merger. *In re Jefferies Group, Inc. Shareholders Litigation*, 2015 WL 3540662, *2 n.3 (Del. Ch. June 5, 2015), involved an "option to pay" a company's own stock. *National Union Fire Insurance Co. of Pittsburgh, Pa. v. Freeport-McMoRan, Inc.*, 767 F. Supp. 568, 569 n.2 (D. Del. 1991), involved a settlement paid in a company's "own stock." GAAP's "share-based payment" rules address companies issuing their own equity.

That sophisticated parties can sometimes agree to alternative consideration in M&A deals does not transform every obligation to "pay" into an invitation for creative financial engineering.[1] The ability to structure bespoke corporate transactions where parties agree to "pay" with stock no more defines the ordinary meaning of "pay" in this context than would pointing to the fact that the verb is used in the phrases "pay a visit," "pay attention," or "pay respects." In the context of an insurance indemnity obligation, "pay" carries its ordinary commercial meaning: "[t]o transfer money that one owes." *See* OB, 3. AMC attempts to escape this commercial reality by arguing that stock is money, and therefore its "payment" fits within the definition. However, common sense tells us that stock is not money. AMC's dismissal of *Wisconsin Central* as interpreting obsolete 1937 definitions (AB, 25) falls flat because the Supreme Court's holding—that assets with monetary value are not themselves money—is timeless and self-evident. *See Wisconsin Central*, 585 U.S. at 281 (holding that "while the term 'money' *sometimes* might be used in this much more expansive sense [(*i.e.*, to include stock options)], that isn't how the term was *ordinarily* used at the time of the Act's adoption (*or is even today*)." (third emphasis added)). Here, where Midvale must "pay on behalf of" AMC, only the ordinary meaning of "pay" makes sense.

[1] By law, U.S. dollars are legal tender for all debts, public and private. *See* 31 U.S.C. § 5103. Stock is not. Federal law reflects the reality that the default form of the verb "pay" contemplates transferring legal tender unless there is some independent indicia that the parties mean something else. No such indicium is present here.

b) The Currency Provision Forecloses AMC's Arguments.

AMC ignores that the Currency Provision's language does not merely reference currency valuation—it requires conversion at the "*rate of exchange* most recently published in the Wall Street Journal." A0361. This is a term of art with a settled meaning; "rates of exchange" refer to national currencies. *See, e.g.*, 10 *Del. C.* § 5201(10) ("[T]he rate at which money of [one] country may be converted into money of another country"); *Exchange Rate*, Black's Law Dictionary (12th ed. 2024) (similar).

This precise terminology dooms AMC's argument. The provision shows that the parties knew how to handle obligations that are not in U.S. dollars: convert them immediately using objective, published rates between *currencies*. If the parties intended to cover stock, they would have provided a similar mechanism. Instead, they used specific terminology that refers only to foreign exchange rates, foreclosing AMC's argument that a new stock issuance is payable under the policy.[2] Moreover, the provision contemplates immediate valuation at the rate of exchange on the date of the "Insurer's obligation to pay." A0361. But AMC certainly did not introduce

[2] That Vice Chancellor Laster colloquially referred to stock as "a form of currency" in *In re Activision Blizzard, Inc. Stockholder Litigation*, 124 A.3d 1025, 1053 (Del. Ch. 2015), is no more revelatory than finding an isolated reference to frequent-flyer miles or AMC Stubs reward points as a "loyalty currency." The meaning is clear from context: the "currency" referenced in the policy does not include stock.

a copy of the Wall Street Journal in the record, nor do the accounting documents it introduced in support of its valuation constitute evidence of any "rate of exchange."

In short, insurance policies spell out what they cover. This one covers currency, not equity.

c) The Exhaustion and Legal Tender Provision Forecloses AMC's Arguments.

Like the Superior Court's decision, AMC summarily dismisses the Exhaustion and Legal Tender Provision as irrelevant. But its relevance is manifest: AMC is suing an excess insurer that is obligated to pay only where the underlying limits have been paid in "legal tender." A0299. AMC cannot explain how stock—which is not "legal tender" (*see supra* n.1)—could exhaust the underlying limits as is necessary to trigger coverage under the Midvale Excess Policy. The answer is simple: it cannot.[3]

3. The Bump-Up Provision Proves Midvale's Point.

AMC's Bump-Up Provision argument is fatally flawed because it ignores *who* is paying. This provision addresses "consideration paid…by the Company"—AMC itself—in corporate transactions. A0352. The insuring agreement addresses what *Midvale* must "pay on behalf of" AMC. A0348. AMC wants this Court to believe that because AMC can pay "consideration" in stock, Midvale also must be able to

[3] Midvale's "represent[ation]" cited by AMC (AB, 32 n.10) addressed different issues and has no relevance in this context. *See infra* section III.A.

pay claims in stock. But Midvale's interpretation does not rest on "tense[s]," (AB, 27) as AMC argues; it rests on context. The insuring agreements require insurers to "pay" amounts, meaning that "pay" *must* carry its ordinary meaning of a monetary transfer to settle a debt, while "consideration paid" invokes what might be paid in M&A deals involving AMC, a specialized context where corporations may exchange stock as consideration. A0352. This contextual difference exposes AMC's evasion of Midvale's argument. If "paid" inherently included stock transfers, the modifier "consideration" would be mere surplusage. Indeed, the provision only excludes "*amount[s]*" that "*represent*" consideration—because only "amounts," denominated in money, would be Loss in the first place. *Id.*

AMC's reliance on *Viacom Inc. v. U.S. Specialty Insurance Co.*, 2023 WL 5224690 (Del. Super. Aug. 10, 2023), and *Northrup Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 347015 (Del. Super. Feb. 2, 2021), is misplaced. Neither court addressed whether "consideration paid" encompasses stock; both found that the provision did not apply to stock-for-stock mergers. A0352. These cases have no bearing on what "pay" means here.

II. AMC CANNOT RECOVER FROM INSURANCE WHERE, AS HERE, THE SETTLEMENT ISSUANCE COST IT NOTHING

AMC's view is that it can collect millions of dollars from insurance without a corresponding depletion of assets. For the reasons discussed below, AMC is wrong.

A. The Policy Insures AMC Only For Actual Losses.

1. The Policy's Text and Structure Compel Indemnification Only Where AMC Is Legally Obligated to Suffer Financial Harm.

There is nothing "extra-contractual" (AB, 3) about Midvale's arguments. When a policy covers "Loss" that an insured must "pay," those words inherently require the transfer or sacrifice of something of value. And, if a person or entity creates value without a loss of assets, it has "paid" nothing. Midvale is applying the words of the policy, not grafting on new ones.

AMC fails to identify any nexus between what AMC was legally obligated to give up and what it now seeks to recover from Midvale. AMC argues that the shares it issued came "from its own coffers," but AMC did not have that stock in its "coffers" because that stock did not yet exist. AB, 42. Creating the new shares cost AMC nothing, so AMC did not suffer any "Loss," and the settlement is therefore valued at $0.

AMC gives short shrift to the policy's requirement that Midvale pay any Loss "on behalf of" AMC. AB, 29-30. It nowhere addresses Midvale's contention that the words of the policy show that the parties intended to limit coverage to risks that can actually be shifted. OB, 33. It only cites *AT&T* and *Sycamore*, but those cases are not to the contrary; rather, they hold that coverage attaches "once 'an insured faces a legal obligation to pay.'" AB, 38. In both *AT&T* and *Sycamore*, it was dispositive that the insureds ultimately remained legally liable to pay a monetary settlement or judgment if the alternative funding sources they had secured fell through. *Sycamore*, 2021 WL 4130631, at *20 (holding that insureds were ultimately liable if the "alternate sources of funding rescinded their pledges[.]"); *AT&T*, 931 A.2d at 417 (holding that insureds are ultimately liable if indemnifying company "reneged on its indemnification undertaking[.]"). Unlike in *Sycamore* and *AT&T*, AMC had no obligation to part with any assets that cost it any money—in other words, AMC had no obligation to "pay" anything, ever.

AMC leans heavily on a hypothetical scenario regarding an entirely different transaction, where AMC would have sold shares for cash and then paid the cash in settlement. AB, 5-6. Midvale does not dispute that D&O insurance responds to monetary settlement payments. But there is a profound difference between surrendering cash earned from transactions at market risk, and parting with no cash at all. The former could reflect a legal obligation to pay and a Loss of money; the latter cannot.

2. Recognizing Coverage Where AMC Suffered No Economic Harm Would Grant It a Windfall.

Delaware courts have interpreted contracts in accordance with common-sense business principles, regardless of whether those principles favor the insured or insurer. OB, 36-37; *see Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 913, 927 (Del. 2017) (concluding that Delaware courts "giv[e] sensible life to a real-world contract," taking into account "[t]he basic business relationship between parties."). Delaware courts have repeatedly disallowed windfalls under property and auto policies, and there is no reason why D&O insurance coverage should be different. *Id.*[4] AMC does not take issue with this principle—it merely states that it is not receiving a windfall because it has "yet to receive a single recovery." AB, 48. But AT&T—which was legally obligated to pay actual cash on behalf of its directors and officers to settle a lawsuit—indisputably suffered monetary harm and therefore no windfall. In sum, AT&T paid real money and sought reimbursement; AMC paid no money and seeks a jackpot.

[4] AMC suggests that property policies illustrate how insurers can pay for non-monetary losses. AB, 25. However, those first-party policies address how such losses will be valued. The absence of analogous provisions in D&O policies for such valuation confirms that they are not intended to work in this way.

3. Case Law Confirms That AMC Suffered No Compensable Loss.

Midvale highlighted a case that is directly on point. (OB, 37-39). In *Enterasys*, an insured resolved a securities class action with a settlement that included a stock issuance. The *Enterasys* court recognized that when a corporation issues stock to existing stockholders, it "[does] not suffer any harm, economic or otherwise." 364 F.Supp.2d at 31-32.

AMC's response to *Enterasys* is telling in its weakness: AMC resorts to the conclusory assertion that *Enterasys* "simply got it wrong." AB, 45. AMC contends that *Enterasys* focused on whether the share issuance was loss to the shareholders rather than the company. AB, 46. While the *Enterasys* court also addressed arguments about loss to the shareholders, it held that "[w]hen a corporation issues new shares (up to the maximum authorized number), the value of its assets are not diminished…*No loss to the corporation occurs*." 364 F.Supp.2d at 31 (emphasis added). AMC also takes issue with statements in *Enterasys* about what would happen if the company sold the newly-issued shares and then used the cash proceeds to settle (AB, 46) but that issue was not before the *Enterasys* court or this one.

AMC cites other cases, but none are on point. *UNR Industries, Inc. v. Continental Casualty Co*., 942 F.2d 1101 (7th Cir. 1991), involved neither a D&O policy nor the issuance of stock to existing stockholders. Rather, in *UNR*, the insured filed for bankruptcy after facing numerous asbestos-related claims. *Id.* at 1104. As part of that reorganization, 63% of the shares *in the new company emerging from bankruptcy* were put into a trust to address the asbestos claims. *Id.* The *Enterasys* court refused to rely on *UNR,* explaining:

> [T]he stock transfer represented not an addition of equity holders (slicing the company pie in thinner pieces) while the company retained its present value, as is the case here. [Instead,] UNR actually "lost" nearly all of its assets, and 63% of that loss was attributable to payment of its settlement obligations to the underlying class action plaintiffs.

364 F.Supp.2d at 34.

Earth Elements, Inc. v. National American Insurance Co., 48 Cal.Rptr.2d 399 (Cal. Ct. App. 1995), did not turn on any policy language. Instead, it addressed damages for an insurer's breach of its duty to defend and whether the insured could include surrendering a counterclaim which was released as part of a settlement. Unlike the settlement at issue here, the value of the counterclaim was expressed in dollars and could be paid on the insured's behalf.

In *International Insurance Co. v. Johns*, 874 F.2d 1447 (11th Cir. 1989), an insured company settled a derivative suit by (1) paying a cash settlement and (2) reducing the term of a consulting agreement with one of the company's directors. The court concluded that the reduction in the consulting contract—which had a fixed *monetary* rate and term—was loss *to the individual insured director*. *Id.* at 1454. There is no analogue to that contract here.

Sauk County v. Employers Insurance of Wausau, 623 N.W.2d 174 (Wis. Ct. App. 2000), involved the court's interpretation of whether the insured's promise to "defend, indemnify and hold [the claimant] harmless" constituted a "payment" within the meaning of the court's prior opinion and did not turn on policy language. *Id.* at 177. *Sauk* is plainly distinguishable because an insurer can "defend" and "indemnify" on the insured's behalf whereas here Midvale cannot ever issue stock on AMC's behalf. *Id*.

Finally, *In re Illinois National Insurance Co*., 685 S.W.3d 826, 831-32 (Tex. 2024), addressed when an insured had suffered a loss and assigned its claims for coverage to the claimant. The court found that, although the claimant could sue the insurance company directly, the settlement with the insured could not be used to establish the existence or amount of coverage. *Id.* at 843. This case supports Midvale's assertion that AMC should not be able to manipulate the amount of Loss through a manner or mode of settlement.

B. AMC Has Not Proven as a Matter of Law That It Was Damaged by the Settlement.

AMC bears the burden of proving it suffered quantifiable, compensable damages as a matter of law from the alleged breach of the Policies. The two damages theories AMC offers, based on a $99.3 million line-item on its financials and some unquantified amount of "lost opportunity" damages, fail to meet that burden.

1. AMC Cannot Manufacture Loss through Accounting.

AMC cannot conjure insurance coverage from thin air through accounting entries simply because they comply with GAAP. Compliance with GAAP does not create insurance coverage, the policy language does.[5]

The undisputed facts tell the real story. AMC issued shares to settle litigation. After the settlement, AMC ***subtracted*** $99.3 million from equity as part of its accumulated deficit, but ***added*** $99.3 million to equity in the form of Additional Paid-in Capital ("APIC") and par value.[6] The result? In AMC's own words: ***"zero" net impact*** on its assets. A1070-71, A0260. Zero depletion of assets means that AMC has lost nothing. This should end the inquiry.

Yet AMC points to accumulated deficit and its income statement in isolation from the rest of its accounting. AB, 39. As AMC admits, its accounting records reflected a contingent liability *before* it was legally obligated to pay the settlement, and this liability was *extinguished* from the balance sheet once the shares were

[5] That EY and Kroll blessed the accounting shows only that AMC followed GAAP—not that it suffered an insurable economic harm.

[6] A balance sheet provides a snapshot of a company's assets, liabilities, and equities at a given time illustrated by the fundamental accounting equation: Assets = Liability + Equity. A1057. Accumulated deficit is the total amount by which a company's losses have exceeded its profit since inception. A1068. Par value is the nominal value assigned to all shares—for AMC, a penny. A1069-70. APIC represents the premium (*i.e.*, amount in excess of par value) that a company receives when new shares are issued. A1067. Accumulated deficit, par value, and APIC are considered "equity." A1070.

issued. A1062. AMC then included that amount in accumulated deficit with an "offsetting" increase to APIC and par value. A1067. Reshuffling equity on the balance sheet does not create a loss.

AMC's emphasis on "permanent" entries in accumulated deficit misses the point. AB, 39. The corresponding $99.3-million increase in AMC's equity in the form of APIC is equally "permanent." A1071.

The truth is simpler than AMC's convoluted accounting explanations: AMC satisfied its settlement obligation by printing new shares that cost it nothing to create. AMC is wrong that the Chancery Court did not "describe[] the Settlement's post-payment effect on…***AMC***." AB, 42. The Chancery Court did so explicitly, stating that the settlement came "at the expense of ***APE unitholders***"—not of AMC. A0751 (emphasis added). This is not a "Loss" to AMC that Midvale must "pay" any more than it would be if AMC had incorporated a stock split as part of the settlement.[7]

2. AMC's "Lost Opportunity" Theory Fails.

AMC asserts that it lost "valuable corporate opportunities" to use the shares it issued as part of the settlement. AB, 42. AMC is wrong for at least four independent reasons.

[7] AMC argues that a stock split "equally divid[es]" ownership while its settlement paid "only a select Class." AB, 42. But this distinction is irrelevant—in both cases, the company creates new equity at zero cost to itself.

First, "opportunity cost" is not what AMC was "legally obligated to pay" to settle the litigation. *Id.*; A0351. The policy language does not respond to hypothetical internal business impacts. AMC cites no authority suggesting that D&O insurance, which covers monetary settlements paid to third parties, also responds to the first-party loss of foregone corporate opportunities from settlement structures the insured voluntarily chose.

Second, AMC cannot lose an opportunity it did not have in the first instance. When it settled, AMC was barred from issuing shares by court order. A1061. The settlement allowed AMC to issue more stock, which it did by issuing over 40 million shares and raising capital.[8] *See* A1069-70. It cannot be that the settlement both created and destroyed economic opportunity at the same time. AMC contends that the status quo order would have eventually been lifted through either a different settlement or a judgment at trial, AB, 43 n.14, but that is pure conjecture. As a matter of law, "mere speculation" cannot support a damages claim. *Affordable Autos, Inc. v. Dietert*, 2016 WL 1169244, *6 (Del. Super. Mar. 24, 2016).

Third, even if AMC had an opportunity to issue shares but for the settlement itself, AMC has not come forward with any evidence suggesting that it has lost such

[8] AMC's inability to issue new shares was a significant problem, leading to the creation of the APEs and ultimately the Common Shareholder Litigation. Unlocking the ability to issue shares—beyond those used in the settlement—benefited AMC by helping it increase its liquidity. AR0008; A1070.

opportunity. The record is devoid of evidence suggesting that AMC has run out of headroom or is in any imminent danger of doing so.[9] AMC's "lost opportunity" is speculation that Delaware courts routinely reject when (as here) no evidence is supplied beyond conjecture. *Id*. at *6 n.25.

***Fourth*,** AMC does not quantify its lost opportunity in dollars. This is because AMC *cannot* do this, as any lost opportunity would materialize only *if and when* it needed shares it cannot issue. This would require the court to engage in impermissible speculation about when AMC might need shares, at what price, and for what purpose—variables that AMC's volatile stock price (swinging from $5 to over $50) renders pure guesswork.

[9] That is unlike *Interpublic Grp. of Cos., Inc. v. Lumbermens Mut. Cas. Co.*, No. 06CV751-AKH, Hearing Tr. at 19 (S.D.N.Y. Dec. 6, 2006), where the insured provided evidence that it might have to buy back shares.

III. THE SUPERIOR COURT'S RULING UNDERMINES NUMEROUS INSURANCE PRINCIPLES

A. This Case Is Proof of the Practical Problems with AMC's Approach.

One should not have to be a CPA to understand the value of a settlement under a D&O policy. Yet AMC could only value its Loss through complex accounting—an approach it did not explain to Midvale until well after this litigation commenced. OB, 23. Fully-liquid stock purchased on the open market may have a "readily discernible value" (AB, 47) at a moment in time, but this case demonstrates that newly-issued stock is situated differently.

The answer to this practical problem is not to recognize coverage without conducting a valuation, as the ruling here did. *See* OB, 40. Midvale did not state that the court "need not decide" this issue. AB, 48. Midvale stated that the valuation was irrelevant if the court held as a matter of law that AMC suffered a covered Loss in excess of Midvale's attachment point. A1553; A1557. That is stating the obvious, not conceding the contested. Rather, the answer to the problem is supplied by the policy: no valuation mechanism and no dollar figure means no Loss.

B. Providing Coverage for Cost-Free Stock Issuances Violates Basic Principles of Insurance.

AMC conflates the fortuity of litigation with the deliberate structuring of the settlement to "pay" nothing. While the Common Shareholder Litigation may have been an insured peril, AMC's decision to settle with newly-created shares that cost it nothing was a calculated business decision designed to avoid any actual economic loss and loot its insurance policies. Insurance exists to indemnify against fortuitous losses, not to reward sly settlement structuring. *See* OB, 36-38.

AMC claims fortuity is irrelevant because it did not know that it would be sued when it purchased the policy (AB, 44-45). However, even when the initial peril is fortuitous, an insured may not purposefully convert its business affairs into an insurable loss. *See, e.g.*, *Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.*, 866 F.2d 71, 77 (3d Cir. 1989). AMC made the calculated business decision to settle with a share issuance that cost it nothing. It must now live with the consequences.

C. The Ruling Creates Perverse Incentives That Will Undermine D&O Insurance's Core Purpose.

AMC dismisses concerns about perverse incentives as "[h]ypothetical [f]ears" and "absurd scenarios." AB, 34. But the Superior Court's decision has already transformed these fears into reality, and companies are already strategizing devious settlement structures to manufacture insurance coverage. *See, e.g.*, *Delaware Court Recognizes D&O Coverage for Non-Cash Settlements*, Hunton Insurance Recovery Blog (Mar. 17, 2025), https://www.hunton.com/hunton-insurance-recovery-blog/delaware-court-recognizes-d-o-coverage-for-non-cash-settlements ("Small changes, like nuances in settlement agreements or accounting practices, can make or break claims for millions of dollars of potential coverage.").

AMC's response that D&O insurance "protects the corporation from securities claims" (AB, 34) fundamentally misunderstands D&O insurance. At its core, D&O insurance exists to protect directors and officers; AMC was *not even a defendant* in the operative underlying complaint at the time of the settlement here. A0730. AMC could not have "indemnified" its directors and officers for this settlement because directors and officers are not liable to issue stock. AMC's assertion that it *did* indemnify directors and officers (*id*.) is concerning, as that would mean that directors and officers could have been ultimately liable for the settlement at issue here. Midvale raised the concern that AMC's position could artificially expand liability for Delaware's directors and officers (OB, 28) but AMC ignored it.

Also troubling is AMC's cavalier suggestion that insurers should simply "revis[e] future policies to exclude such payments." AB, 35. This perfectly captures AMC's cynicism: exploit the policy language, collect the windfall, and let future policyholders deal with the fallout. But this Court rejected that cynical reasoning in *Verizon*, *Solera*, *FairPoint*, and *Jarden* (*see* OB, 29 (citing cases)), where it faithfully interpreted insurance contracts according to their intended scope rather than inviting insurers to draft new exclusions for risks they never agreed to cover in the first place.

The inescapable reality here is that AMC printed stock at no cost, demanded millions from Midvale, and now asks this Court to leave Delaware's fiduciaries to pay the inevitable premium increases. AMC's self-serving view of insurance is wrong—insurance is about protection, not profit. Affirming the Superior Court's ruling would greenlight AMC's alchemy and invite more corporations to transmogrify newly-issued stock into cold, hard cash. That is not insurance—it is opportunism. And this Court should reject it.

CONCLUSION

This Court should reverse the ruling below.

Respectfully submitted,

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