IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CLEAR CHANNEL OUTDOOR HOLDINGS, INC.,	)	
Plaintiff,	)	
v.	)	C.A. No. N24C-02-208 PAW CCLD
ILLINOIS NATIONAL INSURANCE COMPANY, STARR INDEMNITY & LIABILITY COMPANY, QBE INSURANCE CORPORATION, and ACE AMERICAN INSURANCE COMPANY,	)	
Defendants.	)	

Date Submitted: January 27, 2026
Date Decided: April 28, 2026

MEMORANDUM OPINION

Upon Plaintiff's Motion for Partial Summary Judgment;
GRANTED.

Upon Defendant's Motion for Summary Judgment on Indemnity;
DENIED.

Upon Defendant's Motion for Summary Judgment on Response Costs;
DENIED AS MOOT.

Upon Defendant's Motion for Summary Judgment on the Implied Covenant of Good Faith and Fair Dealing;
GRANTED.

David J. Baldwin, Esq.; Peter C. McGivney, Esq.; and Periann Doko, Esq., of Berger McDermott LLP; and Lynda A. Bennett, Esq.; Thomas E. Redburn, Jr., Esq.; Rasmeet K. Chahil, Esq.; and Alexander B. Corson, Esq., of Lowenstein Sandler LLP, *Attorneys for Plaintiff Clear Channel Outdoor Holdings, Inc.*

Kurt M. Heyman, Esq.; Aaron M. Nelson, Esq.; and Brendan Patrick McDonnell, Esq., of Heyman Enerio Gattuso & Hirzel LLP; and Scott B. Schreiber, Esq.; Arthur Luk, Esq.; William C. Perdue, Esq.; Bou Lee, Esq.; Caroline Dorsey, Esq.; Stefan Suazo, Esq.; and Devin M. Adams, Esq., of Arnold & Porter Kaye Scholer LLP, *Attorneys for Defendant Illinois National Insurance Company*.

WINSTON, J.

I. INTRODUCTION

Plaintiff Clear Channel settled an SEC investigation regarding its internal accounting controls and alleged improper payments made by its subsidiary. The SEC order implementing the settlement required Clear Channel to pay $16.35 million "disgorgement" (plus $3.76 million in prejudgment interest) and a $6 million "civil monetary penalty." In this action, Clear Channel seeks insurance coverage from Defendant AIG for the "disgorgement" and prejudgment interest amounts, as well as for costs of defending the SEC proceedings. Throughout the more than seven years since Clear Channel first notified AIG of the investigation, the parties have quarreled over AIG's coverage obligations, first regarding defense costs and later regarding indemnification for the settlement. Now, the parties move for summary judgment on three issues.

First, the parties cross-move on AIG's obligation to indemnify Clear Channel for the settlement. The parties agree that the civil monetary penalty is a "civil . . . penalt[y] imposed by law" uncovered by the Policy. AIG contends that there is no coverage for the amount labeled "disgorgement" either, because it too is a penalty, in substance. AIG also asserts that the disgorgement amount is uncovered because it is uninsurable as a matter of public policy. Neither argument is persuasive. The Policy separately addresses "civil . . . penalties" and disgorgement, the two monetary remedies the SEC can impose. AIG's interpretation is contrary to the Policy's plain

meaning, taking account of the context of SEC enforcement and the contract as a whole. As to public policy, Delaware courts seldom invalidate parties' contractual choices and will only hold matters uninsurable when required by a strong public policy clearly expressed by the General Assembly. No public policy sufficient to overcome the parties' contract exists here. The insurance contract provides coverage for the disgorgement and prejudgment interest amounts in the SEC settlement. Accordingly, Clear Channel is entitled to summary judgment that AIG must indemnify it for those amounts.

Second, AIG moves for judgment that it has no obligation to pay additional defense costs. Because indemnification on the disgorgement and prejudgment interest amounts will exhaust the Policy limits, the defense costs issue is moot.

Last, AIG seeks judgment that it is not liable for extracontractual damages for bad faith. Although the Court disagrees with the arguments AIG has raised against indemnity, those arguments were not made in bad faith. Considering that AIG has raised a *bona fide* coverage dispute, Clear Channel's complaints about AIG's claims-handling conduct do not rise to the level of bringing a bad faith claim before a jury.

In sum, AIG must indemnify Clear Channel for the SEC settlement up to the Policy limit. Clear Channel is not entitled to extracontractual damages.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

A. THE POLICY

Defendant Illinois National Insurance Company ("AIG")[2] issued a primary directors-and-officers insurance policy (the "Policy") to non-party iHeartMedia, Inc. ("iHeart"), for the policy period of August 30, 2017 to May 1, 2019, as extended.[3] The Policy covered Plaintiff Clear Channel Outdoor Holdings, Inc. ("Clear Channel") as an **Organization,**[4] because iHeart controlled Clear Channel.[5]

Under one coverage part, the Policy provides that it "shall pay the **Loss** of any **Organization** . . . arising from any **Securities Claim** made against any such **Organization** for any **Wrongful Act** of such **Organization**."[6]

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[1] References to exhibits submitted by the parties are made as follows: "[abbreviated name of brief with which exhibit submitted] Ex. [number or letter]." Clear Channel submitted a set of exhibits jointly with each of its answering briefs opposing AIG's motions. Those exhibits are referenced as "Clear Channel Ans. Brs. Ex. [number]." Abbreviations of briefs are provided in notes 96 through 98 below.

[2] AIG Claims, Inc. was "the authorized representative of Illinois National Insurance Company," which issued the insurance policy relevant to this action. *See* AIG Good Faith Op. Br. Ex. T at '344.

[3] Clear Channel Indemnity Op. Br. Ex. M (hereinafter "Policy"), Decls. Item 2, Endorsement Nos. 16, 18.

[4] The Policy's defined terms are bolded herein, consistent with the Policy.

[5] *See id.* §§ 1, 2(ee), (ii), (ww); AIG Good Faith Op. Br. Ex. F; AIG Good Faith Op. Br. Ex. G at '392. There is no dispute that Clear Channel is an "**Organization**" under the Policy or that the Policy "affords coverage" to **Organizations**. *See* AIG Indemnity Op. Br. at 6; Clear Channel Indemnity Op. Br. at 16 & n.6.

[6] Policy § 1 (Coverage B(i)(1)).

Wrongful Act, "with respect to an **Organization**," means "any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act by such **Organization**, but solely in regard to a **Securities Claim**."[7]

Securities Claim includes "a civil lawsuit, enforcement action or administrative or regulatory proceeding brought by the Securities & Exchange Commission (SEC)."[8]

Loss is defined to include "damages . . ., settlements, [and] judgments (including pr[e]/post-judgment interest)," as well as to "specifically include . . . punitive, exemplary and multiple damages."[9] **Loss**, however, "shall not include . . . civil or criminal fines or penalties imposed by law" or "matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed."[10] The definition of **Loss** provides: "Enforceability of this paragraph shall be governed by such applicable law that most favors coverage for such penalties and punitive, exemplary and multiple damages."[11]

A Policy exclusion provides: "The **Insurer** shall not be liable to make any payment for **Loss** . . . in connection with any **Claim** made against an **Insured** . . .

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[7] *Id.* § 2(yy)(2).

[8] *Id.* § 2(uu).

[9] *Id.* § 2(dd).

[10] *Id.*

[11] *Id.*

arising out of, based upon or attributable to any . . . remuneration, personal profit or other financial advantage to which the **Insured** was not legally entitled . . . if established by any final, non-appealable adjudication in any underlying proceeding other than an action or proceeding initiated by the **Insurer** to determine coverage under the policy . . . ."[12]

B. THE SEC INVESTIGATION AND CEASE-AND-DESIST ORDER

Clear Channel was the majority owner of a Chinese subsidiary, Clear Media Limited ("Clear Media").[13] In January 2018, Clear Media became aware that an employee had confessed that he and others had misappropriated funds.[14] Two months later, Clear Channel voluntarily disclosed to the SEC the misappropriation, that it had been engaged in internal investigations, and that "certain financial irregularities . . . may implicate the anti-bribery, books and records and internal controls provisions of the U.S. Foreign Corrupt Practices Act [('FCPA')]."[15] Shortly thereafter, the SEC requested that Clear Channel agree to toll the statute of limitations on any enforcement action and began a years-long investigation.[16]

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[12] Policy § 4(a)(1).

[13] *See* Clear Channel Indemnity Op. Br. Ex. B (hereinafter "Cease-and-Desist Order") ¶¶ 1, 5.

[14] *See id.* ¶ 28.

[15] Clear Channel Indemnity Op. Br. Ex. D.

[16] *See, e.g.*, AIG Indemnity Op. Br. Exs. C, D, E; AIG Response Costs Op. Br. Exs. E, F.

Following the investigation, on September 28, 2023, the SEC issued an "Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order" (the "Cease-and-Desist Order"). In findings that Clear Channel neither admitted nor denied,[17] the Cease-and-Desist Order stated that "[f]rom at least 2012 through 2017, Clear Media bribed Chinese government officials . . . to obtain concession contracts required to sell advertising services to public and private sector clients," and that "Clear Media used sham intermediaries and false invoices to generate cash for off-book consultants engaged to win advertising business from government and private customers."[18] It further stated that "[f]rom at least 2012 through 2019 . . ., [Clear Channel] failed to ensure that sufficient internal accounting controls were in place at Clear Media."[19] "[A]s a result of Clear Media's improper payments, which were inaccurately recorded as legitimate business expenses in [Clear Channel's] consolidated books and records," the SEC found, "[Clear Channel] received approximately $16.4 million in benefits."[20] Based on these findings, the SEC determined that Clear Channel violated the FCPA.[21]

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[17] *See* Cease-and-Desist Order at 1.

[18] *Id.* ¶ 1.

[19] *Id.*

[20] *Id.*

[21] *Id.* ¶¶ 38-40.

The Cease-and-Desist Order required Clear Channel to "pay disgorgement of $16,355,567, prejudgment interest of $3,760,920, and a civil monetary penalty in the amount of $6,000,000 to the [SEC] for transfer to the general fund of the United States Treasury."[22] The SEC found that "[t]he disgorgement and prejudgment interest . . . does not exceed [Clear Channel's] net profits from its violations" and "is consistent with equitable principles."[23] "[I]n these circumstances," the order states, "distributing the disgorged funds to the United States Treasury is the most equitable alternative."[24] As to the "civil penalty," the order provides that, "[t]o preserve [its] deterrent effect," Clear Channel would not claim it as an "offset or reduction of any award of compensatory damages" in certain actions brought by investors.[25] The order further provides that "[a]mounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes."[26]

Prior to entering the Cease-and-Desist Order, the SEC conducted years of extensive investigation. Throughout, the SEC interviewed executives and

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[22] *Id.* at 11.

[23] Cease-and-Desist Order ¶ 41.

[24] *Id.*

[25] *Id.* at 12.

[26] *Id.*

employees,[27] sent a document subpoena and other written requests for information,[28] and met with and received presentations from Clear Channel.[29] As late as June 2023, Clear Channel was responding to "follow-up questions and clarifications" regarding factual support for calculations of "tainted revenue."[30]

The order also followed extensive negotiation based on the information the SEC obtained. In December 2021, the SEC made a "reverse proffer"[31] seeking $32.44 million in disgorgement, $8.8 million prejudgment interest on that amount, and civil penalty of $18.8 million.[32] The disgorgement amount consisted of $30.66 million "in estimated benefit based on advertising contracts with state-owned affiliated entities from 2013-2017" that the SEC "characterized as obtained through

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[27] *See* AIG Response Costs Op. Br. Ex. I at '310.

[28] *See, e.g.*, AIG Response Costs Op. Br. Exs. J, K.

[29] *See, e.g.*, AIG Response Costs. Op. Br. Exs. I, N, W, X.

[30] *See* AIG Response Costs Op. Br. Ex. L at '790-93.

[31] Clear Channel's SEC defense counsel testified that "reverse proffer" is a "term that SEC uses to indicate a process where it sets out its views of the fact investigation that it has conducted." Clear Channel Indemnity Op. Br. Ex. C at 21:3-6. AIG's SEC policies and procedures expert explains that "a reverse proffer generally means a presentation of information by the SEC staff to counsel for a witness or potential defendant/respondent." Clear Channel Indemnity Op. Br. Ex. FF (hereinafter "AIG Expert Report") ¶ 41.

[32] *See* AIG Response Costs Op. Br. Ex. LL at '941-42. The parties have not identified a written demand from the SEC documenting the reverse proffer, but it is reflected in Clear Channel emails, presentations, and memoranda. *See, e.g.*, *id.*; Clear Channel Indemnity Op. Br. Ex. E at '037; Clear Channel Indemnity Op. Br. Ex. F at '246.

improper cash payments in the customer development scheme" and $1.78 million "in revenue obtained in Shanghai and Hangzhou from end of 2016 through January 2018," which the SEC "tied to entertainment expenses, business development assistance fees, and special fees."[33]

Clear Channel and the SEC disagreed regarding the appropriate methodology for calculating disgorgement, particularly with respect to the SEC's initial $30.66 million customer development expenses calculation. For its calculation of "tainted revenue," the SEC relied on evidence of improper consultant payments and extrapolated to a broader geographic area and timeframe.[34] Clear Channel contended that this extrapolation method "is inconsistent with governing case law" which requires that disgorgement "not exceed net profits from the improper activity."[35] In Clear Channel's view, disgorgement could be based only on "actual, documented revenue."[36] This disagreement and the disgorgement calculation were the subject of extensive discussion and analysis by Clear Channel and the SEC.[37]

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[33] *See* AIG Response Costs Op. Br. Ex. LL at '941.

[34] *See, e.g.*, Clear Channel Indemnity Op. Br Ex. G at '611; Clear Channel Indemnity Op. Br. Ex. H at '744.

[35] AIG Indemnity Op. Br. Ex. I at '104; Clear Channel Indemnity Op. Br. Ex. E at '050.

[36] *See* Clear Channel Indemnity Op. Br. Ex. G at '585.

[37] *See, e.g.*, Clear Channel Indemnity Op. Br. Exs. E, G, I, L.

Clear Channel also disagreed that any civil penalty was warranted.[38] Based on these disagreements, in April 2022, Clear Channel made a counteroffer to settle the matter for disgorgement of about $4.6 million, prejudgment interest of $1.07 million, and a civil penalty of $1.4 million.[39]

Following Clear Channel's counteroffer, with the parties' positions set forth, negotiations "stalled."[40] In an effort to break the impasse, in September 2022, the SEC reached out to Clear Channel to consider whether, "t[aking] a step back and look[ing] at the big picture," the parties might be able to "agree on a range of a number and figure out a way to get to that number."[41] That outreach caused the parties to resume negotiations.[42] The SEC made an offer that included $16.75 million in disgorgement and a $10 million civil penalty, which it subsequently reduced to $16.35 million and $7 million.[43] Clear Channel was able to negotiate the civil penalty further down to $6 million but, in Clear Channel's counsel's

[38] *See, e.g.*, Clear Channel Indemnity Op. Br. Ex. E at '063-65.

[39] *See* AIG Indemnity Ans. Br. Ex. K at '917; *see also* Clear Channel Ans. Brs. Ex. 40 at '974.

[40] *See* AIG Indemnity Op. Br. Ex. K at 162:11-14.

[41] *See id.* at 162:15-22, 163:8-15.

[42] *See id.* at 164:2-165:22.

[43] *See* AIG Indemnity Ans. Br. Ex. K at '917.

recollection, the SEC "made clear that [it] would not reduce the disgorgement amount any lower."[44]

In the end, the SEC "determined to accept" the offer reflected in the Cease-and-Desist Order, including approximately $16.35 million in disgorgement and a $6 million civil monetary penalty.[45]

C. THE PARTIES' COVERAGE CORRESPONDENCE

Throughout most of the SEC investigation and settlement negotiations, Clear Channel and AIG exchanged correspondence concerning insurance coverage, with disputes regarding coverage and the allocation of invoices arising along the way.

In November 2018, Clear Channel provided AIG notice of the SEC investigation.[46] The initial notice letter, sent by iHeart's and Clear Channel's broker, provided a brief description of the matter and attached the SEC's request to toll the statute of limitations and certain SEC requests for information.[47] It also stated that the SEC sought to "interview a few current and former executives," which is "a standard step in this level of investigation" with "no implications of any wrongdoing."[48]

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[44] *See* Clear Channel Ans. Brs. Ex. 16 at 255:7-18, 256:2-6.

[45] *See* Cease-and-Desist Order at 1, 11.

[46] *See* AIG Good Faith Op. Br. Ex. E.

[47] *See id.*

[48] *See id.* at '696.

After discussing the matter with Clear Channel's broker,[49] on February 7, 2019, AIG provided its "preliminary coverage position" letter.[50] That letter advised that there may be coverage for the costs of individual officers and directors in responding to the SEC investigation.[51] However, the letter stated, the Policy did not provide coverage for Clear Channel's own response costs.[52] Because one law firm would be representing both Clear Channel and one of the individuals, the letter advised, "only the amounts attributable to tasks performed for the individual[] . . . will be considered for potential coverage under the . . . Policy."[53] In addition, the letter noted that iHeart was in bankruptcy and, given this, AIG "has concerns that the . . . Policy might be viewed as being subject to an automatic stay."[54] Accordingly, AIG requested that Clear Channel demonstrate there was no automatic stay in place or seek relief from the bankruptcy court to allow payment.[55]

In subsequent years, as the investigation proceeded, the parties exchanged communications regarding payment. Between July and December 2019, Clear

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[49] *See* AIG Good Faith Op. Br. Ex. S.

[50] *See* AIG Good Faith Op. Br. Ex. T.

[51] *Id.* at '344, '347-48.

[52] *Id.* at '344-47.

[53] *Id.* at '348.

[54] *Id.*

[55] *Id.*

Channel submitted law firm invoices,[56] but over subsequent months, AIG had not paid them. In an internal email, an AIG employee would later describe AIG's claims handler as having "sat on the bills" during that time.[57] In June 2020, AIG indicated that it believed many of the invoices submitted on behalf of individuals included uncovered work for Clear Channel.[58] To avoid the time and expense of analyzing each invoice "one by one" to "make all appropriate reductions, deletions and seek explanations as appropriate," AIG offered to allocate percentages of invoices to covered individuals and the remaining to uncovered expenses for Clear Channel.[59] Clear Channel's broker subsequently indicated Clear Channel was willing to move forward with that proposed structure.[60]

In June and July 2020, AIG also raised the issue of whether iHeart had consented to Clear Channel receiving payment.[61] The prior year, Clear Channel had separated from iHeart, and that separation was governed by a Separation Agreement.[62] AIG indicated that it read two provisions of the Separation Agreement

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[56] *See, e.g.*, Clear Channel Ans. Brs. Exs. 4-7.

[57] *See* Clear Channel Ans. Brs. Ex. 14 at '872.

[58] *See* AIG Response Costs Op. Br. Ex. UU at '645.

[59] *See id.*

[60] *See* AIG Response Costs Op. Br. Ex. WW at '470-71.

[61] *See* Clear Channel Ans. Brs. Ex. 18.

[62] *See* AIG Good Faith Op. Br. Ex. G.

to, among other things, "state that iHeart has the sole right and authority to submit and process covered claims against [Clear Channel] under any iHeart insurance policies."[63] In response, Clear Channel's broker exclaimed to an AIG employee: "Dude - what the f[**]k? This is way overdue and now they are trying to pull this crap?"[64] Shortly thereafter, AIG agreed to make payment "[b]ased on [Clear Channel's broker's] representations" that the Separation Agreement did not affect Clear Channel's right to coverage and iHeart did not have the right to control the insurance claim.[65] AIG subsequently made payments, though Clear Channel contends that those payments were inadequate and late.[66]

The parties also communicated about the investigation. AIG asked for general updates.[67] Clear Channel provided written updates, including specifying that the investigation concerned certain provisions of the FCPA and providing copies of SEC subpoenas.[68] Clear Channel did not inform AIG of the dollar amounts of settlement

[63] *See* Clear Channel Ans. Brs. Ex. 18 at '782.

[64] *Id.* at '781.

[65] *See* Clear Channel Ans. Brs. Ex. 30 at '822

[66] *See* Clear Channel Good Faith Ans. Br. at 7-8.

[67] *See, e.g.*, Clear Channel Ans. Brs. Ex. 31 at 138:10-12; AIG Good Faith Op. Br. Exs. V, W.

[68] *See, e.g.*, Clear Channel Indemnity Op. Br. Exs. P, Q, R.

offers that were exchanged with the SEC until later.[69] However, in March 2022, Clear Channel's defense counsel had a call with AIG, after which AIG noted: "Clear Channel is in discussions with the DOJ and SEC to try to reach a settlement which would involve a penalty and disgorgement of profits."[70] A July 2022 AIG "Financial Lines Claims Roundtable Meeting Memo" provides: "The insu[r]ed has informed that they are in the process of negotiating a settlement with the SEC . . . but that the negotiations may take several more months."[71] It further reads: "There is no coverage for the entity and coverage is being provided for the individual insureds under Pre-Claim Inquiry Costs. iHeart is currently negotiating a settlement with the SEC on behalf of the company. Defense costs and settlement on behalf of the company are not covered under the policy. . . . Resolution strategy is to allow the company to continue its negotiations to settle the matter and to pay the portion of defense fees which are incurred on behalf of the individuals."[72]

On August 18, 2023, Clear Channel sent AIG a draft of the SEC Cease-and-Desist Order.[73] A few days later, Clear Channel informed AIG that it was "close to

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[69] *See* AIG Good Faith Op. Br. at 11; Clear Channel Good Faith Ans. Br. at 36 (not disputing that, as "AIG complains," "Clear Channel did not disclose the specific *amount* of the offers and counter offers until August 2023").

[70] *See* AIG Good Faith Op. Br. Ex. V at '454.

[71] *See* Clear Channel Indemnity Op. Br. Ex. DD at '606.

[72] *Id.* at '606-07.

[73] *See* AIG Good Faith Op. Br. Ex. WW at '074.

finalizing a settlement with the SEC which would consist of $16.3M disgorgement, $3.7M interest, $6M penalty" and that "the SEC will not agree to any further negotiation" of these terms.[74] Clear Channel asked AIG not to raise lack of consent as a coverage defense, and AIG indicated it could not agree until it received additional information.[75] On September 1, 2023, AIG sent Clear Channel a request for documents and information, including details of the settlement discussions and information exchanged between Clear Channel and the SEC.[76]

On September 21, 2023, in addition to providing documents requested by AIG,[77] Clear Channel responded to AIG's February 9, 2019 coverage letter.[78] In its response letter, Clear Channel demanded AIG "immediately consent to the Proposed Settlement," "acknowledge that the disgorgement and prejudgment interest payments" are covered, and "acknowledge its obligation to reimburse all outstanding **Defense Costs**."[79]

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[74] *See* AIG Good Faith Op. Br. Ex. V at '452; AIG Good Faith Op. Br. Ex. BB at '166.

[75] *See* AIG Good Faith Op. Br. Ex. V at '452.

[76] *See* AIG Good Faith Op. Br. Ex. CC at '350-51.

[77] *See id.* at '346-49.

[78] AIG Good Faith Op. Br. Ex. U at '414.

[79] *Id.* at '425.

Following the parties' unsuccessful mediation in December 2023, on January 4, 2024, AIG responded to Clear Channel's letter.[80] In addition to reiterating its position that Clear Channel was not entitled to its own response costs, AIG asserted that there was no indemnity coverage for the SEC disgorgement and prejudgment interest amounts because they were uncovered penalties and uninsurable under Delaware law.[81] AIG also indicated that it was "reserv[ing] all rights" regarding certain other matters.[82] These included whether, as a result of the iHeart separation, "Clear Channel currently constitutes an Organization under the Policy," as well as whether Clear Channel had provided "cooperation" as required by the Policy and the "reasonableness" of the SEC settlement.[83]

D. THIS ACTION AND THE PRESENT MOTIONS

Clear Channel filed this action on February 20, 2024, asserting three counts.[84] Counts One and Two are for breach of contract: Count One concerning AIG's alleged duty to pay Clear Channel's response costs,[85] and Count Two AIG's alleged duty to

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[80] Clear Channel Ans. Brs. Ex. 48 at '174.

[81] *Id.* at '178-80.

[82] *See id.* at '181-84.

[83] *See id.*

[84] *See* D.I. 1. In addition to AIG, three excess insurance carriers were named as defendants. *See id.* at 1. Clear Channel and those excess insurance carriers have since settled, leaving AIG as the sole defendant. *See* D.I. 173; D.I. 186; D.I.190; D.I. 192.

[85] *See* D.I. 1 ¶¶ 93-96.

indemnify Clear Channel for the "disgorgement and pre-judgment interest components" of the SEC settlement.[86] Count Three seeks a declaratory judgment that AIG is required to pay all **Loss** incurred by Clear Channel in connection with the SEC matter.[87] On March 20, 2025, Clear Channel amended its complaint to add Count Four, seeking "compensatory, consequential, and punitive damages" for "Breach of the Duty of Good Faith and Fair Dealing."[88] AIG's answer to the initial complaint included an affirmative defense that the SEC matter did not "constitute a 'Securities Claim' against an 'Organization'" under the Policy,[89] but after Clear Channel amended its complaint, AIG dropped "against an 'Organization'" from its defenses.[90]

Clear Channel previously filed a motion for partial summary judgment seeking an order that the SEC's initial request to toll the statute of limitations triggered an obligation for AIG to pay Clear Channel's response costs.[91] The Court denied that motion in July 2025.[92]

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[86] *See id.* ¶¶ 97-100.

[87] *See id.* ¶¶ 101-07.

[88] *See* D.I. 170 ¶¶ 144-58, p. 35.

[89] *See* D.I. 26 at 40 (Fourth Affirmative Defense); *see also id.* (Fifth Affirmative Defense, also referencing "a 'Securities Claim' against an Organization").

[90] *See* D.I. 189 at 56.

[91] *See* D.I. 61.

[92] *See* D.I. 224 at 16, 18.

Now before the Court are four summary judgment motions filed in August 2025. In the first two, the parties cross-move on the issue of whether AIG is required to indemnify Clear Channel for payment of disgorgement and related prejudgment interest pursuant to the Cease-and-Desist Order.[93] In the third, AIG seeks judgment on Counts One and Three on grounds that no event prior to the Cease-and-Desist Order triggered an obligation to pay Clear Channel's response costs.[94] In the fourth, AIG seeks judgment on Clear Channel's "Breach of the Duty of Good Faith and Fair

[93] *See* D.I. 241; D.I. 243.

[94] *See* D.I. 239.

Dealing" count.[95] The parties filed opening briefs,[96] answering briefs[97] and replies[98] on each motion.

[95] *See* D.I. 242.

[96] *See* D.I. 239, Illinois National Insurance Company's Br. in Support of Its Mot. for Summ. J. on Clear Channel's Response Costs (hereinafter "AIG Response Costs Op. Br."); D.I. 241, Illinois National Insurance Company's Br. in Support of Its Mot. for Summ. J. on Indemnity (hereinafter "AIG Indemnity Op. Br."); D.I. 242, Def. Illinois National Insurance Company's Br. in Support of Its Mot. for Summ. J. on the Implied Covenant of Good Faith and Fair Dealing (hereinafter "AIG Good Faith Op. Br."); D.I. 268, Pl. Clear Channel Outdoor Holdings, Inc.'s Corrected Op. Br. in Support of Its Mot. for Partial Summ. J. (hereinafter "Clear Channel Indemnity Op. Br.") (correcting D.I. 244).

[97] *See* D.I. 253, Illinois National Insurance Company's Br. in Opp'n to Pl.'s Mot. for Partial Summ. J. on Indemnity (hereinafter "AIG Indemnity Ans. Br."); D.I. 269, Pl. Clear Channel Outdoor Holdings, Inc.'s Corrected Ans. Br. in Opp'n to Def. Illinois National Insurance Company's Mot. for Summ. J. on Clear Channel's Response Costs (hereinafter "Clear Channel Response Costs Ans. Br.") (correcting D.I. 254); D.I. 270, Pl. Clear Channel Outdoor Holdings, Inc.'s Corrected Ans. Br. in Opp'n to Def. Illinois National Insurance Company's Mot. for Summ. J. on Indemnity (correcting D.I. 255); D.I. 271, Pl. Clear Channel Outdoor Holdings, Inc.'s Corrected Ans. Br. in Opp'n to Def. Illinois National Insurance Company's Mot. for Summ. J. on the Implied Duty of Good Faith and Fair Dealing (hereinafter "Clear Channel Good Faith Ans. Br.") (correcting D.I. 256).

[98] *See* D.I. 261, Illinois National Insurance Company's Reply Br. in Support of Its Mot. for Summ. J. on Clear Channel's Response Costs (hereinafter "AIG Response Costs Reply"); D.I. 262, Illinois National Insurance Company's Reply Br. in Further Support of Its Mot. for Summ. J. on Indemnity (hereinafter "AIG Indemnity Reply"); D.I. 263, Pl. Clear Channel Outdoor Holdings, Inc.'s Reply Br. in Further Support of Its Mot. for Partial Summ. J. (hereinafter "Clear Channel Indemnity Reply"); D.I. 264, Illinois National Insurance Company's Reply Br. in Further Support of Its Mot. for Summ. J. on the Implied Covenant of Good Faith and Fair Dealing.

III. STANDARD OF REVIEW AND INTERPRETATIVE PRINCIPLES

A. SUMMARY JUDGMENT

The Court grants summary judgment upon a showing "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[99] The movant bears the burden of establishing the nonexistence of issues of material fact.[100] Upon such a showing, the burden shifts to the nonmovant to demonstrate genuine factual issues exist.[101] The Court views the facts in the light most favorable to the nonmovant.[102]

These standards likewise apply when the parties file cross-motions for summary judgment.[103] Such motions are not *per se* concessions that no material disputes of fact exist.[104] Yet, if no party argues a factual dispute exists, the Court deems the cross-motions to be a stipulation for decision on the merits based upon the record submitted with the motions.[105]

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[99] Del. Super. Ct. Civ. R. 56(c).

[100] *KBranch, Inc. v. BSI3 Menu Buyer Inc.*, 2026 WL 446425, at *3 (Del. Super. Jan. 30, 2026) (citing *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)).

[101] *Id.* (citing *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995*)*).

[102] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

[103] *KBranch*, 2026 WL 446425, at *3 (citing *Capano v. Lockwood*, 2013 WL 2724634, at *2 (Del. Super. May 31, 2013)).

[104] *Mason v. United Servs. Auto. Ass'n*, 697 A.2d 388, 392 (Del. 1997) (citing *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997)).

[105] Del. Super. Ct. Civ. R. 56(h).

B. INSURANCE POLICY INTERPRETATION

The Delaware Supreme Court has summarized the principles governing insurance policy interpretation as follows:

> "Insurance contracts, like all contracts, 'are construed as a whole, to give effect to the intentions of the parties.'" Proper interpretation of an insurance contract will not render any provision "illusory or meaningless." If the contract language is "clear and unambiguous, the parties' intent is ascertained by giving the language its ordinary and usual meaning." Where the language is ambiguous, the contract is to "be construed most strongly against the insurance company that drafted it." A contract is not ambiguous simply because the parties do not agree on the proper construction. "Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."
>
> Insurance contracts should be interpreted as providing broad coverage to align with the insured's reasonable expectations. "Generally, an insured's burden is to establish that a claim falls within the basic scope of coverage, while an insurer's burden is to establish that a claim is specifically excluded." Courts will interpret exclusionary clauses with "a strict and narrow construction . . . [and] give effect to such exclusionary language [only] where it is found to be 'specific,' 'clear,' 'plain,' ['conspicuous,' and 'not contrary to public policy.'"[106]

[106] *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 905-06 (Del. 2021) (alterations in original) (citations omitted).

IV. ANALYSIS

The parties' motions raise three issues: first, whether AIG is required to indemnify Clear Channel for its payment of "disgorgement of $16,355,567" and "prejudgment interest of $3,760,920" under the SEC's Cease-and-Desist Order; second, whether AIG is required to pay Clear Channel certain costs of responding to the SEC prior to the Cease-and-Desist Order; and third, whether Clear Channel's "Breach of the Duty of Good Faith and Fair Dealing" count may proceed to trial.

The Court addresses each issue in turn. As explained further, first, Clear Channel is entitled to indemnity for disgorgement and prejudgment interest paid to the SEC in settlement. Second, based on the indemnity ruling, the response costs motion is moot. Third, the record does not support bad faith conduct sufficient for Clear Channel's claim to proceed before a jury.

A. INDEMNITY

In the Cease-and-Desist Order, the SEC ordered Clear Channel to pay "disgorgement of $16,355,567, prejudgment interest of $3,760,920, and a civil monetary penalty in the amount of $6,000,000."[107] The parties agree that the "civil monetary penalty" is not indemnifiable. They disagree about "disgorgement," together with the prejudgment interest on that amount.[108]

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[107] Cease-and-Desist Order at 11.

[108] The parties do not dispute that if disgorgement must be indemnified, prejudgment interest must be too. *See* AIG Indemnity Reply at 5 n.2. Accordingly, this opinion

The dispute turns on whether the disgorgement amount is a **Loss**. Clear Channel argues that it is, because **Loss** includes "settlements" and there is no dispute that the Cease-and-Desist Order is a settlement.[109] AIG contends that it is not, relying on two provisions within the **Loss** definition.[110] One provides that "'**Loss**' . . . shall not include . . . civil . . . penalties imposed by law," the other that "**Loss**' . . . shall not include . . . matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed."[111]

As a threshold matter, AIG bears the burden to prove that the disgorgement amount is excluded. Although the provisions on which AIG relies are "in the defined terms section, rather than in the section enumerating exclusions, [they] operate[] as . . . exclusion[s] based on [their] exclusionary effect."[112] Accordingly, AIG must

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sometimes uses the term "disgorgement" or "disgorgement amount" to refer to collectively to the "disgorgement" and "prejudgment interest" amounts in the Cease-and-Desist Order.

[109] *See* Clear Channel Indemnity Op. Br. at 15-16.

[110] *See* AIG Indemnity Op. Br. at 10, 26-27.

[111] *See* Policy § 2(dd).

[112] *Viacom Inc. v. U.S. Specialty Ins. Co.*, 2023 WL 5224690, at *7 (Del. Super. Aug. 10, 2023) (citations omitted); *Northrop Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 347015, at *18-19 (Del. Super. Feb. 2, 2021); *see also Harman Int'l Indus., Inc. v. Ill. Nat'l Ins. Co.*, 2025 WL 84702, at *1 n.6 (Del. Super. Jan. 7, 2025) ("To be clear, this provision [within the definition of 'Loss'] is an exclusion." (citations omitted)), *aff'd*, --- A.3d ----, 2026 WL 204209 (Del. Jan. 27, 2026). In *Harman*, our Supreme Court recently affirmed a ruling that treated a provision within the definition of "Loss" as an exclusion. However, the Supreme Court did not squarely decide that issue because the insurer—the defendant in the present

show the disgorgement amount is "specifically excluded," and the Court will interpret these clauses with "a strict and narrow construction" and give them effect only if they are "specific, clear, plain, conspicuous, and not contrary to public policy."[113]

Because they are treated as exclusions, the Court herein calls the **Loss** provisions on which AIG relies the "Civil Penalties Exclusion" and the "Uninsurability Exclusion." As explained below, AIG has not met its burden to show that either exclusion applies.[114]

1. THE CIVIL PENALTIES EXCLUSION DOES NOT APPLY.

The Cease-and-Desist Order separately delineates payment of a "civil monetary penalty" and "disgorgement." Yet, AIG asserts that the Court must look past the "label" and determine that both payments were "penalties" within the Policy's Civil Penalties Exclusion.[115] As explained further below, AIG's interpretation would require the Court to ignore the Policy's plain language and

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case—waived argument on it on appeal. *See Harman*, 2026 WL 204209, at *6-7 & n.63.

[113] *See Harman*, 2026 WL 204209, at *6 (quoting *Murdock*, 248 A.3d at 906).

[114] AIG is correct that "an insured's burden is to establish that a claim falls within the basic scope of coverage." *See* AIG Indemnity Reply at 12. That principle, however, is inapposite, because Clear Channel has met its burden: the Cease-and-Desist Order is indisputably a "settlement" within the meaning of **Loss**. *See* AIG Indemnity Op. Br. at 1 (acknowledging that the case concerns a "settlement with the SEC").

[115] *See, e.g.*, AIG Indemnity Ans. Br. at 11-12.

commercial context, and AIG's authorities outside of the insurance context do not change the result.

a. READ IN CONTEXT, THE CIVIL PENALTIES EXCLUSION DOES NOT REACH DISGORGEMENT IN THE SEC SETTLEMENT.

The Policy covers "**Loss** . . . arising from any **Securities Claim**."[116] **Loss** includes "settlements" and "pr[e]/post-judgment interest," and **Securities Claim** includes an "enforcement action or administrative or regulatory proceeding brought by the [SEC]."[117] Accordingly, by its plain language, the Policy covers settlements and prejudgment interest from SEC proceedings.

In enforcement proceedings like those at issue here, the SEC may seek only two types of monetary remedies: disgorgement and civil monetary penalties.[118] The

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[116] Policy § 1 (Coverage B(i)(1)). Coverage B also requires that the **Loss** be of an **Organization** for a **Wrongful Act** of such **Organization**. There is no dispute that Clear Channel is an **Organization** or that the indemnity sought is for a **Wrongful Act** of Clear Channel.

[117] *Id.* §§ 2(dd), (uu).

[118] *See* AIG Expert Report ¶ 44 ("The remedies sought in SEC enforcement actions can have two separate financial components: disgorgement and civil monetary penalties."); 15 U.S.C. § 78u(d)(3), (5), (7). The SEC may also seek prejudgment interest. *See* 17 C.F.R. § 201.600. The SEC's authority to seek disgorgement historically arose from 15 U.S.C. § 78u(d)(5), which authorizes the SEC to seek "equitable relief." *See Liu v. SEC*, 591 U.S. 71, 74 (2020) (holding SEC may seek disgorgement as a form of equitable relief under section 78u(d)(5), provided certain circumstances are met). More recently, Congress amended section 78u(d) to explicitly authorize "disgorgement" under section 78u(d)(7). *See SEC v. Govil*, 86 F.4th 89, 99-100 (2d Cir. 2023). Relatedly, while the parties have referenced section 78u(d), it appears that section refers to actions in court, whereas section 77h–1

authority to impose those remedies is set forth in particular statutory provisions, and they have unique limitations.[119]

Considering this context, it is notable that the words used in the Civil Penalties Exclusion mirror those in securities law statutes concerning civil monetary penalties, and not those concerning disgorgement.[120] The securities laws authorize the SEC to seek to "impose . . . a civil penalty," and separately delineates between such civil penalties, on one hand, and "equitable relief" or "disgorgement," on the other.[121] The

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concerns "cease-and-desist proceedings." *See* 15 U.S.C. § 77h–1(e), (g). Because section 77h–1 likewise appears to authorize only disgorgement and civil penalties, and neither party has raised any relevant differences between the remedies available in section 78u(d) and section 77h–1, the Court here follows the parties' lead and references section 78u(d).

[119] *See* 15 U.S.C. § 78u(d)(3) (granting authority to impose "civil penalt[ies]" and establishing three-tier structure limiting amount of penalties for each violation); *id.* § 78u(d)(5), (7) (granting authority to impose disgorgement); *Liu*, 591 U.S. at 74-75 (explaining limitations on disgorgement awards under language of section 78u(d)(5)); *Govil*, 86 F.4th at 102 (explaining that disgorgement under section 78u(d)(7) "must comport with" limitations on section 78u(d)(5)).

[120] *See In re FairPoint Ins. Coverage Appeals*, 311 A.3d 760, 770 (Del. 2023) (noting that, when interpreting the definition of "Securities Claim," it "immediately stood out" that "the words used in the definition mirror those in a specific area of the law recognized as securities regulation" (quoting *In re Verizon Ins. Coverage Appeals*, 222 A.3d 566, 573 (Del. 2019))).

[121] *See* 15 U.S.C. § 78u(d)(3), (5), (7). As noted above (*supra* n.118), at the time the Policy was entered, section 78u(d) did not refer explicitly to "disgorgement," *see Govil*, 86 F.4th at 99-102, but courts had relied on that section to impose that remedy, *see Liu*, 591 U.S. at 75-76 (explaining that "[o]ver the years . . . courts have continued to award" the remedy known as "disgorgement" under section 78u(d)(5)). And, section 77h–1, which was last amended in 2010, did explicitly reference disgorgement. *See id.* at 75 (citing 15 U.S.C. § 77h–1(e)).

Civil Penalties Exclusion excludes "civil . . . penalties imposed by law."[122] It does not mention "equitable relief," "disgorgement," or any words approximating them. The most natural reading, then, is that the Civil Penalties Exclusion concerns the remedy the securities laws call a "civil penalty," not the other remedy that the exclusion does not reference. That gives the exclusion's words their "plain and ordinary meaning" and properly considers the "securities regulation context" around which the parties were contracting.[123]

This interpretation finds further support when reading the Policy as a whole, as the Court must.[124] Elsewhere in the Policy, the parties addressed the circumstances in which disgorgement would be excluded. Section 4(a)(1) excludes from coverage **Loss** "arising out of, based upon or attributable to any . . . remuneration, personal profit or other financial advantage to which the **Insured** was not legally entitled," but only where "established by any final, non-appealable adjudication in any underlying proceeding."[125] Although it does not use the term

[122] Policy § 2(dd).

[123] *See FairPoint*, 311 A.3d at 770-71 (citing *Verizon*, 222 A.3d at 773-75).

[124] *Murdock*, 248 A.3d at 905; *see also Origis USA LLC v. Great Am. Ins. Co.*, 345 A.3d 936, 954 (Del. 2025) ("What is needed is a more in-depth analysis that considers the combination of these provisions and how they function together.").

[125] Policy § 4(a)(1).

"disgorgement," this exclusion plainly covers that remedy.[126] Thus, the Policy addresses the two types of monetary remedies available to the SEC: whereas the Civil Penalties Exclusion excludes civil monetary penalties full-stop, Section 4(a)(1) excludes disgorgement only where established by final adjudication. Because the disgorgement amount was established by settlement, not final adjudication, the Policy does not exclude coverage for it.[127] Read as a whole, the Policy covers SEC settlements for disgorgement and excludes them only for civil monetary penalties.

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[126] *See Kokesh v. SEC*, 581 U.S. 455 (2017) (explaining that "disgorgement is a form of '[r]estitution measured by the defendant's wrongful gain'" and that, historically, courts in SEC enforcement proceedings ordered disgorgement in part "to 'deprive . . . defendants of their profits in order to remove any monetary reward for violating' securities laws" (citations omitted)); *SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006) (explaining that disgorgement had "been used by the SEC and courts to prevent wrongdoers from unjustly enriching themselves through violations" and to "force[] a defendant to account for all profits reaped through his securities law violations and to transfer all such money to the court"); *G-New, Inc. v. Endurance Am. Ins. Co.*, 2022 WL 4128608, at *8 (Del. Super. Sept. 12, 2022) ("Disgorgement is defined as 'the act of giving up something (such as illegally obtained profits) on demand or by legal compulsion." (quoting *TIAA-CREF Individual & Institutional Servs., LLC v. Ill. Nat'l Ins. Co.*, 2016 WL 6534271, at *10 (Del. Super. Oct. 20, 2016))).

[127] *See Gallup, Inc. v. Greenwich Ins. Co.*, 2015 WL 1201518, at *4, 9-10 (Del. Super. Feb. 25, 2015) (holding that similar exclusion "show[ed] that Defendant contemplated coverage for restitution and specifically decided that reimbursement for restitution would only be precluded upon a final adjudication that the money Plaintiff received was actually restitution" where insurer argued that settlement amount constituted "fines, penalties or taxes imposed by law" excluded within the definition of "Loss"); *see also Murdock*, 248 A.3d at 902-03 (explaining that similar exclusion for fraud "implies that fraud that does not fall within the exclusion because it has not been finally adjudicated will otherwise be covered"); *Sycamore P'rs Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 761639, at *12 (Del. Super. Feb. 26, 2021) (explaining that insurers could have "exclude[d] coverage for cases in

Seeking a different result, AIG relies on definitions of the word "penalty" from dictionaries and areas of law other than insurance or securities enforcement.[128] True, dictionary definitions often aid in ascertaining the meaning of contract terms.[129] But when interpreting a contract, "a court cannot read words in isolation" but must read them in their "natural habitat" of "a larger text."[130] As the Court of Chancery has explained, "dictionary definitions are not the only possible source of plain meaning," and "a court may look to how a term or phrase is used in a particular legal context."[131] The Policy does not exclude "penalties" in general but "civil or criminal . . . penalties imposed by law."[132] As noted above, in the SEC enforcement context, "civil . . . penalties" has a particular meaning distinct from disgorgement, and that meaning is of greatest import here. This Court will not assign the word

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which restitution or disgorgement damages or settlements are obtained" but instead "cabined the exclusion to cases in which a claimant obtained a 'final, non-appealable' decision in the underlying litigation").

[128] *See, e.g.*, AIG Indemnity Op. Br. at 11, 17-21 (relying on definitions from a dictionary, contract law, tax law, and equity jurisprudence). To be sure, certain of the caselaw AIG cites regarding "tax law" and "equity" overlaps with securities law. Those cases are addressed further below. *See infra* § IV.A.1.b.

[129] *See, e.g.*, *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 740-42 (Del. 2006).

[130] *In re P3 Health Grp. Hldgs., LLC*, 282 A.3d 1054, 1066 (Del Ch. 2022).

[131] *Id.* at 1066-67; *see also Lorillard Tobacco*, 903 A.2d at 740 (explaining that, while it is appropriate to look to dictionary definitions, courts must determine meaning "in the context of the contract language and circumstances" (citation omitted)).

[132] Policy § 2(dd).

"penalty" a meaning based on dictionary and non-securities-law definitions when doing so would require plucking that word from the surrounding Policy language and legal context.

AIG also relies on the Delaware Supreme Court's decision in *In re CVS Opioid Insurance Litigation*[133] to argue that the "label" in the Cease-and-Desist Order does not matter, because "settlement agreement language is not a reliable coverage indicator."[134] But in *CVS*, the insured failed to meet its burden to show the underlying proceedings were within the scope of coverage.[135] Here, by contrast, there is little question that the Cease-and-Desist Order falls within the scope of coverage, as a settlement of a **Securities Claim**, and AIG bears the burden of proving an exclusion applies. That distinction aligns this case with *Harman*, where the Supreme Court acknowledged *CVS* but, based in part on settlement agreement language, held the insurer failed to show an exclusion applied.[136]

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[133] 346 A.3d 81 (Del. 2025).

[134] *See, e.g.*, AIG Indemnity Ans. Br. at 11-12 (quoting *CVS*, 346 A.3d at 101).

[135] *See CVS*, 346 A.3d at 86-87, 101 (holding that underlying lawsuits did not fall within scope of coverage for "damages because of 'bodily injury' [or] 'property damage'" and explaining that Superior Court "determined that the *nature* of the claims and relief sought by the underlying plaintiffs do not fall within the scope of coverage").

[136] *See Harman*, 2026 WL 204209, at *14 & n.127. The distinction is further illustrated by another recent Supreme Court decision on which *CVS* relied. *See CVS*, 346 A.3d at 102 (citing *AIG Specialty Ins. Co. v. Conduent State Healthcare, LLC*, 339 A.3d 680, 683-85 (Del. Feb. 3, 2025), as an example where settlement was "potentially collusive"). In *Conduent*, although applying New York law, the Court

Relatedly, in *CVS*, the claims asserted in the underlying complaints controlled.[137] The Court held that the insured could not use settlement agreement language to transform the complaints' claims into covered losses.[138] Here, there is no prior complaint that contradicts the language of the Cease-and-Desist Order. Rather, in addition to embodying the settlement, the Cease-and-Desist Order itself is analogous to a complaint, as the document that "initiated" the enforcement action.[139] In other words, Clear Channel has not used the settlement agreement to morph the claims of a prior complaint into covered losses, because here the settlement agreement and complaint are, in essence, the same document.

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affirmed a ruling that a settlement did not fall within a fraud exclusion because the settling parties allocated all monetary loss to breach of contract and none to fraud. *Conduent*, 339 A.3d at 684, 686-87. In other words, to determine whether loss was excluded, the Court relied at least in part on the settlement agreement's allocation, noting that the insurer might still avoid indemnification but only if it proved the insured "arranged the settlement through fraud or collusion." *See id.* at 687 n.27.

[137] *See CVS*, 346 A.3d at 100-01 (explaining that underlying complaints controlled issue of defense costs, and affirming summary judgment on indemnity as well, because policies did not cover "the *type* of liability asserted in the underlying complaint" (citing *Luria Bros. & Co., Inc. v. Alliance Assurance Co., Ltd.*, 780 F.2d 1082, 1087-88 (N.Y. 1986))).

[138] *See id.* at 101 (rejecting insured's argument that settlement agreement was "a 'transformative document' demonstrating" that the losses fell within the scope of coverage).

[139] *See* AIG Expert Report ¶ 37 (noting that the SEC's "enforcement action was initiated on September 28, 2023"—i.e., on the date of the Cease-and-Desist Order); AIG Response Costs Op. Br. Ex. AAA at 242:24-243:3 (Clear Channel's SEC defense counsel testifying the Cease-and-Desist order both "starts the cease and desist proceeding and settles the cease and desist proceeding").

Moreover, although—like most settlements—the Cease-and-Desist Order was the result of negotiation, there is evidence the negotiation was in good faith and the settlement reasonable. The SEC conducted extensive investigation over five years.[140] It initially contended $32.44 million in disgorgement was warranted based on its calculations from evidence of improper consultant payments.[141] In seeking a lesser sanction, Clear Channel argued that the law required a different calculation method.[142] After Clear Channel and the SEC had presented their positions and reached an impasse, negotiations were set back on track after the SEC proposed agreeing on an overall settlement range.[143] AIG contends that these facts suggest the Cease-and-Desist Order disgorgement amount was in substance a penalty.[144] But there is no contention that the SEC's and Clear Channel's positions were not reasonable and in good faith.[145] Nor is there evidence of collusion between Clear

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[140] As AIG acknowledges, "[f]or five years, the SEC engaged in extensive factfinding efforts, including a subpoena and a supplement, numerous requests for documents, 14 witness interviews, 19 meetings and status calls, and 9 extensions of the Tolling Agreement." AIG Response Costs Op. Br. at 19; *see also id.* at 5-6.

[141] *See* AIG Response Costs Op. Br. Ex. LL at '941-42.

[142] *See, e.g.*, AIG Indemnity Op. Br. Ex. I at '104; Clear Channel Indemnity Op. Br. Ex. E at '050.

[143] *See* AIG Indemnity Op. Br. Ex. K at 162:11-22, 163:7-15.

[144] *See* AIG Indemnity Op. Br. at 21-23.

[145] For its argument that the disgorgement calculation could be based only on "actual, documented revenue," without extrapolations, Clear Channel relied on *Liu*. *See* Clear Channel Indemnity Op. Br. Ex. E at '050. That is a fair argument based on *Liu*'s holding that SEC disgorgement must not "exceed a wrongdoer's net profits."

Channel and the SEC, or that they raised insurance as an issue in their negotiations. And even after the negotiations resumed, the SEC continued following up for information to support disgorgement calculations.[146]

The Policy provides coverage for SEC settlements seeking disgorgement, as distinguished from civil monetary penalties, and AIG bears the burden to show that coverage is "specifically excluded."[147] AIG has not met that burden. There is no evidence that would show that "disgorgement" in the Cease-and-Desist Order was not, in substance, disgorgement. There is thus no basis to transform that order's disgorgement amount into an excluded civil penalty.

b. THE UNITED STATES SUPREME COURT'S INTERPRETATION OF "PENALTY" OUTSIDE OF THE INSURANCE CONTEXT DOES NOT CHANGE THE RESULT.

Seeking a different result, AIG invokes two United States Supreme Court cases. Although both concern the SEC's disgorgement remedy generally, they do

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See Liu, 591 U.S. at 74-75, 83-85, 91 ("Courts may not enter disgorgement awards that exceed the gains 'made upon any business or investment, when both the receipts and payments are taken into account.'" (citation omitted)). But it likewise would have been fair for the SEC to point out that—other than holding that "legitimate expenses" may be deducted—*Liu* does not explicitly instruct how "net profits from wrongdoing" must be measured or hold that it is impermissible to extrapolate based on available evidence. *See generally id.*

[146] *See* AIG Response Costs Op. Br. Ex. L at '790-93; *see also* AIG Response Costs Op. Br. at 19 ("[T]he SEC repeatedly met with Clear Channel and sent emails propounding 'follow-up' questions and document requests through September 2023.").

[147] *Murdock*, 248 A.3d at 906 (citation omitted).

not touch upon insurance, nor do they require a different interpretation of the specific Policy at issue in this case.

In *Kokesh*, the Supreme Court determined that "[d]isgorgement in the securities-enforcement context is a 'penalty' within the meaning of" a statute of limitations codified at 28 U.S.C. § 2462.[148] The Court explained that, in general, whether a sanction is a penalty depends on "two principles."[149] "First, whether a sanction represents a penalty turns in part on 'whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual.'"[150] "Second, a pecuniary sanction operates as a penalty only if it is sought 'for the purpose of punishment, and to deter others from offending in like manner'—as opposed to compensating a victim for his loss."[151]

Applying these principles, the Court determined that "SEC disgorgement constitutes a penalty within the meaning of § 2462."[152] That was because, first, disgorgement is sought for violations "committed against the United States rather

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[148] *See Kokesh*, 581 U.S. at 457. Section 2462 applies a five-year statute of limitations to actions "for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." *Id.* (quoting 28 U.S.C. § 2462).

[149] *See id.* at 461.

[150] *Id.* (citing *Huntington v. Attrill*, 146 U.S. 657, 667 (1892)).

[151] *Id.* at 462 (citing *Huntington*, 146 U.S. at 668).

[152] *Id.* at 463.

than an aggrieved individual."[153] Second, disgorgement "is imposed for punitive purposes" because its primary purpose is "to deter violations of the securities laws by depriving violators of their ill-gotten gains."[154] Last, "in many cases, SEC disgorgement is not compensatory" because, although disgorged funds are sometimes "paid to victims," in other cases they are "dispersed to the United States Treasury."[155]

The Court cautioned that its ruling should not be read to address matters beyond "the sole question presented in this case" of "whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462's limitations period."[156]

Three years later, in *Liu*, the Supreme Court addressed the question it had reserved in *Kokesh*: "whether courts possess authority to order disgorgement in SEC enforcement proceedings."[157] The Court held that they do, as long as the award is "consistent with the equitable principles" underlying the statute authorizing SEC disgorgement.[158] After surveying the history of disgorgement and its predecessor

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[153] *Id.*

[154] *Kokesh*, 581 U.S. at 464 (citation omitted).

[155] *Id.* at 464-65 (citation omitted).

[156] *Id.* at 461 n.3.

[157] *See Liu*, 591 U.S. at 76-77 (quoting *Kokesh*, 581 U.S. at 461 n.3).

[158] *See id.* at 74-75, 92. As noted above, at the time, the applicable statute was 15 U.S.C. § 78u(d)(5), which permits federal courts to grant "any equitable relief that may be appropriate or necessary for the benefit of investors." *See id.* at 75-76

remedies, the Court determined that courts could order SEC disgorgement where it "does not exceed a wrongdoer's net profits and is awarded for victims."[159] The Court then remanded the case for the lower courts to determine whether the disgorgement award was consistent with these principles.[160]

In evaluating the impact of *Kokesh* and *Liu* on insurance policy interpretation, the New York Court of Appeals' *J.P. Morgan*[161] opinion is instructive. There, like here, the court considered whether "disgorgement" in an SEC settlement order was a "penalt[y] imposed by law" excluded from insurance coverage.[162] The court held that it was not.[163] In so holding, the court rejected the insurers' argument that the disgorgement was excluded because it "fits within the Supreme Court's characterization of a penalty."[164] The court explained that "*Kokesh* does not control here," including because the Court in *Kokesh* "was not interpreting the term 'penalty' in an insurance contract," and "the meaning of that term may vary based on

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(quoting 15 U.S.C. § 78u(d)(5)); *supra* n.118. Since *Liu*, Congress added subsection (d)(7), which expressly authorizes courts to order "disgorgement." *See supra* n.118.

[159] *See Liu*, 591 U.S. at 74-75, 78-85.

[160] *See id.* at 75, 87-92.

[161] *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 183 N.E.3d 443 (N.Y. 2021).

[162] *See id.* 445 (alteration in original).

[163] *Id.*

[164] *Id.* at 452.

context."[165] Moreover, the court noted, *Liu* "clarified that SEC-ordered disgorgement is not always properly characterized as a penalty insofar as the SEC may seek 'disgorgement' of a defendant's net gain for compensatory purposes as 'equitable relief' in civil actions."[166] Rather than "mandat[ing] that the . . . disgorgement payment be considered a 'penalty imposed by law' under the insurance policies at issue here," the court explained, "*Kokesh* and *Liu* demonstrate that whether SEC disgorgement is a penalty for various federal purposes has been a matter of much debate and confusion."[167]

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[165] *Id.* (citation omitted).

[166] *Id.* (citing *Liu*, 591 U.S. at 74).

[167] *J.P. Morgan*, 183 N.E.3d at 452-53. AIG points out that in *J.P. Morgan* the court took account of evidence that the disgorgement amount represented valuations of wrongful gains and was placed in a fund to compensate injured parties. *See* AIG Indemnity Op. Br. at 23-25 (citing *J.P. Morgan*, 183 N.E.3d at 445-46, 448, 451). But as explained previously, here too there is evidence that the SEC conducted extensive investigation, including regarding the amount of tainted revenue, and that it negotiated the disgorgement amount based on good faith disagreement about the appropriate method to calculate wrongfully obtained revenues. *See supra* pp. 9-13, 35-36; *see also J.P. Morgan*, 183 N.E.3d at 450 (noting that company "submitted evidence regarding its communications with the SEC throughout the negotiation process indicating that, at the direction of the SEC, [the company] undertook various valuations of its customers' gains and the corresponding injury suffered by investors" and that the SEC "originally sought a higher sanction" but negotiated to accept a lower figure). And, the SEC here explicitly found that Clear Channel "received approximately $16.4 million in benefits as a result of Clear Media's improper payments," which was slightly above the amount the SEC required Clear Channel to pay in disgorgement. *See* Cease-and-Desist Order ¶ 1. In addition, the *J.P. Morgan* court noted that "neither the label assigned to the payment by the SEC and [company], nor the mere fact that injured parties may ultimately receive the

Here, as the New York Court of Appeals recognized, *Kokesh* and *Liu* are not controlling. Neither Supreme Court case interpreted insurance contracts, let alone insurance coverage exclusions that must be given a "strict and narrow construction."[168] Nor could they have informed the parties' reasonable expectations at the time of contracting. Although *Kokesh* was decided a few months before the Policy period began, that opinion expressly cautioned that it was limited to the meaning of a specific limitations statute.[169] And *Liu* was decided after the Policy period, meaning it "could not have informed the parties' understanding of the meaning of the term 'penalty.'"[170] As both opinions acknowledge, "[o]ver the years," courts had ordered disgorged funds "to be deposited in Treasury funds instead of disbursing them to victims."[171] Thus, regardless of whether *Liu* later held that disgorgement must be "awarded for victims," at the time of contracting, the parties would have reasonably understood SEC disgorgement as consistent with the

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funds, is dispositive," but that these were factors to consider. *See J.P. Morgan*, 183 N.E.3d at 451.

[168] *See Murdock*, 248 A.3d at 906 (citation omitted).

[169] *Kokesh*, 581 U.S. at 461 n.3; *see also Liu*, 591 U.S. at 85 (explaining that "*Kokesh* expressly declined to pass on th[e] question" of whether "disgorgement is necessarily a penalty, and thus not the kind of relief available at equity").

[170] *See J.P. Morgan*, 183 N.E.3d at 568 (applying principle to *Kokesh*, which was decided after the relevant policies in *J.P. Morgan*).

[171] *See Liu*, 591 U.S. at 85; *Kokesh*, 581 U.S. at 465 ("Some disgorged funds are paid to victims; other funds are dispersed to the United States Treasury." (citations omitted)).

SEC's practice of depositing funds in the United States Treasury, as occurred here.[172] *Kokesh* and *Liu* do not alter the meaning of the Civil Penalties Exclusion as it would have been understood at the time of contracting.

* * *

In sum, read in the context of SEC enforcement and the Policy as a whole, the Civil Penalties Exclusion unambiguously excludes SEC civil monetary penalties but not SEC disgorgement or prejudgment interest paid in settlement. AIG's interpretation would dissolve the distinction between those remedies as they were imposed by the SEC at the time of contracting. The evidence could not reasonably warrant the conclusion that the amounts labeled "disgorgement" and "pre-judgment interest" in the SEC Cease-and-Desist Order were disguised civil monetary penalties. And the United States Supreme Court's decisions interpreting "penalty" outside of insurance policies do not change the meaning of "civil . . . penalties imposed by law" in the Policy here. AIG has failed to meet its burden to show that the Civil Penalties Exclusion bars coverage for the disgorgement and pre-judgment interest amounts.

[172] Even after *Liu*, "[i]t is an open question whether, and to what extent," depositing disgorged funds with the Treasury "satisfies the SEC's obligation to award relief 'for the benefit of investors' and consistent with the [relevant statute]." *Liu*, 591 U.S. at 89.

2. THE UNINSURABILITY EXCLUSION DOES NOT APPLY.

As an alternative, AIG invokes the Uninsurability Exclusion, contending that the disgorgement amount is not covered because it is "uninsurable as a matter of public policy."[173] As a matter of Delaware law, this argument fails.

Our Supreme Court has explained:

> [W]hen parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract. Such public policy interests are not to be lightly found, as the wealth-creating and peace-inducing effects of civil contracts are undercut if citizens cannot rely on the law to enforce their voluntary-undertaken mutual obligations.[174]

Applying these principles to insurance, "[i]n the absence of clear guidance from the General Assembly to the contrary," the Supreme Court has declined to hold alleged wrongful conduct uninsurable on public policy grounds.[175] It has so declined in

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[173] *See* AIG Indemnity Op. Br. at 26-27 (citing Policy § 2(dd)).

[174] *Murdock*, 248 A.3d at 903 (citation omitted).

[175] *Id.* at 905; *Whalen v. On-Deck, Inc.*, 514 A.2d 1072, 1074 (Del. 1986). AIG argues that the public policy need not be announced by the legislature, because in other contexts Delaware courts have been willing to recognize public policies on their own. *See* AIG Indemnity Op. Br. at 33-34; AIG Indemnity Ans. Br. at 32-33. Regardless, in the insurance context at issue here, the Delaware Supreme Court has required that public policy come from the legislature.

cases analogous to this one, as has this Court in the disgorgement context specifically.

In *Murdock*, the Supreme Court rejected an insurer's argument that public policy prohibited insuring fraud.[176] The insurer protested that allowing recovery for fraud "would undermine the Court of Chancery's disgorgement remedy and, more generally, that, as a matter of public policy, 'insurance should not be available for intentional wrongdoing.'"[177] The Court disagreed, holding that Delaware had no "public policy against the insurability of losses occasioned by fraud so strong as to vitiate the parties' freedom of contract."[178] "[T]o the extent" any public policy had been announced, the Court explained, it weighed in favor of the insurability of such losses.[179] Thus, the Court "reject[ed] [the insurer's] invitation to void its contractual obligations on public policy grounds."[180]

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[176] *See Murdock*, 248 A.3d at 903.

[177] *Id.* at 902.

[178] *Id.* at 903.

[179] *Id.* at 904. Specifically, the Court noted that 8 *Del. C.* § 145 authorizes corporations "to purchase D&O insurance 'against *any* liability' asserted against their directors and officers," including those "arising from bad-faith conduct." *Id.* at 903 (first quoting 8 *Del. C.* § 145(g); and then citing *id.* § 145(a)). As the Court explained, the ability to obtain insurance against liability arising from bad-faith conduct is "[i]mplicit" in the limitations on indemnification in section 145(a) and section 145(g)'s permission for corporations to obtain insurance for liability "whether or not the corporation would have the power to indemnify such person against such liability under this section." *Id.*

[180] *Id.* at 905.

In *Whalen*, the Supreme Court arrived at a similar conclusion regarding punitive damages.[181] The trial court had held that such damages were uninsurable because permitting the wrongdoer to "shift the burden to its insurer" would undermine the remedy's purposes "to punish the wrongdoer and deter him and others from similar conduct."[182] The Supreme Court reversed.[183] Finding that "[t]he Delaware Legislature has formulated no such [public] policy" against punitive damages, the Court refused to "partially void what might otherwise be a valid insurance contract."[184]

And in *Sycamore*, this Court addressed the insurability of disgorgement head-on. There, as here, the insurers contended that a settlement for disgorgement was uninsurable because the disgorged funds "represent[] . . . ill-gotten gain."[185] The Court disagreed. It explained that, "in Delaware, losses are uninsurable as-against public policy only if the legislature so provides," and "this Court has declined invitations to apply judicially-fashioned policy limitations."[186] Finding that there is

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[181] *See Whalen*, 514 A.2d at 1074.

[182] *See id.* at 1073.

[183] *Id.* at 1074.

[184] *Id.*

[185] *See Sycamore*, 2021 WL 761639, at *1; AIG Indemnity Op. Br. at 29-30.

[186] *Sycamore*, 2021 WL 761639, at *11 (first citing *Jones v. State Farm Mut. Auto. Ins. Co.*, 610 A.2d 1352, 1354 (Del. 1992); then citing *Whalen*, 514 A.2d at 1074; then citing *Arch Ins. Co. v. Murdock*, 2018 WL 1129110, at *11 (Del. Super. Mar. 1,

no Delaware statute expressing a clear policy against insuring disgorgement, the Court rejected the insurers' attempt to avoid their contractual obligations.[187]

Applying these cases, the Uninsurability Exclusion has not been triggered. There is no clear Delaware public policy, from the General Assembly or otherwise, "so strong as to vitiate the parties' freedom of contract."[188] Accordingly, just as in *Sycamore*, AIG cannot escape its contract on public policy grounds.

AIG advances several arguments to the contrary. None succeed. First, AIG contends that an applicable policy is expressed in 18 *Del. C.* § 2706.[189] But that statute concerns property insurance, not liability insurance like the Policy here. On its face, section 2706 regulates a "contract of insurance of property or of any interest in property or arising from property,"[190] and AIG cites no case applying it to other types of policies.[191] It is far from the "clear guidance" that our courts require.[192]

2018), *aff'd*, 248 A.3d 887 (Del. 2021); and then citing *Wilson v. Chem-Solv, Inc.*, 1988 WL 109375, at *1 (Del. Super. Oct. 14, 1988)).

[187] *Id.* at *11-12.

[188] *Murdock*, 248 A.3d at 903.

[189] *See* AIG Indemnity Op. Br. at 34; AIG Indemnity Reply at 17-19.

[190] 18 *Del. C.* § 2706(a).

[191] Instead, AIG contends that "the principles underlying" the statute apply more broadly and cites a property insurance case. *See* AIG Indemnity Reply at 18-19 (citing *Nationwide Mut. Ins. Co. v. Goerlitz*, 2001 WL 845703, at *4 (Del. Super. June 29, 2001) (homeowner's and tenant's property policies)).

[192] *Murdock*, 248 A.3d at 905.

Second, AIG points out that the Court in *USAA Casualty Insurance Co. v. Carr* mentioned the "well-established common law principle that an insured should not be allowed to profit, by way of indemnity, from the consequences of his own wrongdoing.'"[193] But if that principle were sufficient to override freedom of contract, it would invalidate a host of unquestionably permissible insurance policies, as catalogued in *Sycamore*.[194] An insured may profit from fraud or polluting the environment, for example, but insuring against fraud claims and environmental cleanup is permissible.[195] Moreover, the Court in *Carr* did not rely on this principle to invalidate coverage. Rather, it ruled that an intentional act was not a covered "accident" under the policy's plain language.[196]

Third, AIG suggests that, under *Murdock*, disgorgement is uninsurable unless there is a "countervailing" public policy against the above "common law principle."[197] But there is a countervailing public policy: freedom of contract.[198] To the extent AIG contends an additional public policy is required, it misunderstands

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[193] *See* AIG Indemnity Op. Br. at 27 (quoting *USAA Casualty Insurance Co. v. Carr*, 225 A.3d 357, 362 (Del. 2020)).

[194] *See Sycamore*, 2021 WL 761639, at *11.

[195] *See id.* (citations omitted); *see also Murdock*, 248 A.3d at 904-05.

[196] *See Carr*, 225 A.3d at 358-59, 361-62.

[197] *See* AIG Indemnity Op. Br. at 31; AIG Indemnity Ans. Br. at 32.

[198] *See Murdock*, 248 A.3d at 903 (explaining that overriding contract requires "a public policy interest even stronger than freedom of contract" (citation omitted)).

Murdock. AIG's interpretation is based on a snippet from *Carr* that the *Murdock* Court determined was "dicta."[199] The additional "announced" public policy in favor of insurability was not necessary to the *Murdock* Court's holding; it only further bolstered that holding.

Last, AIG contends that providing insurance here would "unravel [disgorgement's] very purpose."[200] But the Supreme Court rejected that same reasoning in *Whalen* as applied to punitive damages.[201]

AIG has not identified any public policy that outweighs Delaware's reverence for freedom of contract.[202] Accordingly, it has failed to meet its burden to show that the Uninsurability Exclusion applies.

The Policy covers settlements with the SEC for disgorgement and prejudgment interest thereon, and no exclusion applies. Clear Channel is therefore entitled to judgment requiring AIG to indemnify it for the disgorgement and

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[199] *See id.* at 904 (quoting *Carr*, 225 A.3d at 362). Specifically, AIG points to *Carr*'s reference to "the 'well established common law principle that an insured should not be allowed to profit, by way of indemnity, from the consequences of his own wrongdoing,' *in a context where no announced public policy applies*." *See id.* (emphasis added); AIG Indemnity Op. Br. at 31.

[200] *See* AIG Indemnity Op. Br. at 28.

[201] *Whalen*, 514 A.2d at 1073-74.

[202] *See Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674, 676 (Del. 2024) ("The courts of this State hold freedom of contract in high—some might say, reverential—regard.").

prejudgment interest amounts in the Cease-and-Desist Order. Clear Channel's motion for summary judgment on that issue is granted; AIG's is denied.

B. RESPONSE COSTS

Clear Channel also seeks coverage for certain costs of responding to the SEC, and AIG seeks a ruling that it is not required to pay such response costs.[203] The parties agree, however, that a ruling in Clear Channel's favor on indemnity exhausting the Policy limit would moot AIG's motion on response costs.[204] Accordingly, based on the indemnity ruling above, the Court declines to rule on AIG's response costs motion.[205] That motion is denied as moot.

C. DUTY OF GOOD FAITH

Last, Clear Channel seeks damages beyond the Policy limit, under a count styled "Breach of the Duty of Good Faith and Fair Dealing."[206] Clear Channel

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[203] *See* AIG Response Costs Op. Br. at 2; Clear Channel Response Costs Ans. Br. at 1.

[204] *See* Clear Channel Indemnity Reply at 1 & n.2; Jan. 27, 2026 Oral Arg. Tr. at 149:13-17 (AIG agreeing that ruling in Clear Channel's favor on indemnity, to the extent it exhausted the policy, could moot response costs motion).

[205] *See Murdock*, 248 A.3d at 906-07 (declining to substantively address one issue because ruling on a second issue "exhaust[s] [insurer's] coverage limits rendering consideration of the [first issue] moot").

[206] *See* D.I. 170 ¶¶ 144-58; Clear Channel Indemnity Reply at 1 n.2 (noting that, if judgment is entered in Clear Channel's favor up to the Policy limit, "the sole triable issue will then be Clear Channel's claim for ***extracontractual*** damages flowing from AIG's breach of the implied covenant of good faith and faith dealing" (citing Clear Channel Good Faith Ans. Br. at 29-31)).

characterizes this count as proceeding under a theory of either an insurer's bad faith breach of contract or a breach of the implied covenant of good faith and fair dealing, which it says are distinct.[207] AIG moves for summary judgment on this count.

Delaware recognizes "a cause of action for bad faith against an insurer 'when the insurer refuses to honor its obligations under the policy and clearly lacks reasonable justification for doing so.'"[208] "Reasonable justification requires that, at the time of the denial, facts or circumstances were known to [the insurer] that created a *bona fide* coverage dispute and therefore a meritorious defense to the insurer's liability."[209] The burden of showing a clear lack of reasonable justification is on the insured.[210] "Mere delay is not evidence of bad faith, provided that a reasonable justification exists for refusing to make payment upon submission of proof of loss."[211]

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[207] *See* Clear Channel Good Faith Ans. Br. at 17-19. Clear Channel also invokes the bad faith litigation conduct exception to the American Rule. *See id.* at 30-32.

[208] *Murdock*, 248 A.3d at 910 (quoting *Bennett v. USAA Cas. Ins. Co.*, 158 A.3d 877, 2017 WL 961806, at *4 (Del. 2017) (TABLE)).

[209] *Zurich Am. Ins. Co. v. Syngenta Crop Protection LLC*, 314 A.3d 665, 683 (Del. 2024) (citation omitted).

[210] *Bennett*, 2017 WL 961806, at *4 ("[T]he *plaintiff* must show that the insurer failed to honor its contractual obligations without reasonable justification." (citations omitted)).

[211] *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 266 (Del. 1995).

This State also recognizes that insurance policies, like all contracts, include an implied covenant of good faith and fair dealing.[212] Our Supreme Court has explained that a "bad faith insurance claim" and implied covenant claim are distinct legal concepts.[213] Whereas the former traditionally concerns "denial or delay in claim payments," the latter encompasses broader conduct and is less well-defined.[214] That said, after recognizing the distinction, the Supreme Court has applied the same "reasonable justification" standard whether the issue concerns an insurer's refusal to pay or broader claims-handling conduct.[215]

In addition, whether a claim is framed as bad faith refusal to pay or breach of the implied covenant, extracontractual damages are available only "where the plaintiff can show malice or reckless indifference by the insurer."[216] Delaware courts

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[212] *See Enrique v. State Farm Mut. Auto. Ins. Co.*, 142 A.3d 506, 511 (Del. 2016).

[213] *See Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 440-44 (Del. 2005).

[214] *See id.* (explaining that whereas the "parameters of an action for 'bad faith' refusal to pay insurance proceeds are well settled," the term "good faith" in the implied covenant "has no set meaning, serving only to 'exclude a wide range of heterogeneous forms of bad faith'" (citations omitted)).

[215] *See, e.g.*, *Murdock*, 248 A.3d at 910 (applying reasonable justification standard to "a cause of action for bad faith"); *Enrique*, 142 A.3d at 511, 514 (applying same standard to "a cause of action for breach of the implied covenant of good faith," including when addressing "several events during State Farm's claims-handling process"); *Geico Gen. Ins. Co. v. Green*, 308 A.3d 132, 145 (Del. 2022) (applying same standard to insurer's practice of applying automated rules to process claims).

[216] *See Enrique*, 142 A.3d at 512 (citations omitted). *Enrique* states this standard in the context of punitive damages, whereas Clear Channel also seeks attorneys' fees. Unlike punitive damages, which the Supreme Court has "expressly authorized," *see*

have "characterized malice as situations where the insurer acts with an 'evil motive,' and reckless[] indifference as instances where 'the [insurer must] foresee that [its] unacceptable conduct threatens particular harm to the [insured],' and yet proceeds anyway."[217]

In applying the "reasonable justification" standard, the Court must consider "the strategy, mental impressions and opinion of the insurer's agents concerning the claim."[218] At first blush, such considerations seem fact-intensive and thus ill-suited for summary judgment. Yet, our Supreme Court has cautioned that "[w]here the issue to be tried is one of disputed fact," "unless it appears that the insurer did not

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id. at 512 n.24 (citations omitted), it is unclear whether attorneys' fees are available for a bad faith insurance claim. *Compare, e.g.*, *Clausen v. Nat'l Grange Mut. Ins. Co.*, 730 A.2d 133, 140 (Del. Super. Aug. 1, 1997) (mentioning, in context of discovery motion, that an insurer who acts in bad faith may be liable for "attorney's fees"), *with, e.g.*, *E.I. Du Pont De Nemours & Co. v. Admiral Ins. Co.*, 1994 WL 465547, at *7 (Del. Super. Aug. 3, 1994) ("Until the Legislature adopts statutory language concerning attorney's fees in bad faith insurance actions, or the Supreme Court provides greater flexibility in the characterization of attorney's fees as actual compensatory damages, this Court does not have the authority to recognize attorney's fees as an element of damages in the case at bar."). Even assuming attorneys' fees could be available, Clear Channel provides no reason why the standard would differ from that applied to punitive damages. And to the extent Clear Channel seeks fees under the bad faith litigation exception to the American Rule, *see* Clear Channel Good Faith Ans. Br. at 31-32, that exception applies "only in extraordinary cases," a similarly high bar. *See RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 877 (Del. 2015) (quoting *Lawson v. State*, 91 A.3d 544, 552 (Del. 2014)).

[217] *Enrique*, 142 A.3d at 512 n.25 (alterations in original) (quoting *Jardel Co. v. Hughes*, 523 A.2d 518, 529-30 (Del. 1987)).

[218] *Bennett*, 2017 WL 961806, at *4 (alteration in original).

have reasonable grounds for relying on its defense to liability," a bad faith insurance claim "should not be submitted to the jury."[219] And, it has on numerous occasions affirmed grants of summary judgment on bad faith insurance claims.[220] Accordingly, although a plaintiff need not present a "smoking gun to survive summary judgment,"[221] this Court will not permit a bad faith claim to proceed to trial lightly. Applying these standards, the record is insufficient to bring Clear Channel's claim before a jury.

Looking first to AIG's theories for denying coverage addressed above, neither were advanced in bad faith. The argument regarding the Civil Penalties Exclusion was plausible. Although the Court has determined that certain definitions of "penalty" and rulings of the United States Supreme Court do not render the disgorgement amount a "civil . . . penalt[y]" excluded by the Policy,[222] AIG's arguments based on those authorities are at least colorable.[223] Courts have struggled to determine what disgorgement is, when it is permissible for the SEC to seek it, and

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[219] *Syngenta*, 314 A.3d at 683-84.

[220] *See, e.g.*, *Syngenta*, 314 A.3d at 684; *Murdock*, 248 A.3d at 911; *Enrique*, 142 A.3d at 516.

[221] *See Enrique*, 142 A.3d at 516.

[222] *See supra* § IV.A.1.

[223] *See ACE Am. Ins. Co. v. Guaranteed Rate, Inc.*, 305 A.3d 339, 350 (Del. 2023) (affirming summary judgment on bad faith insurance claim because insurer "made colorable arguments" that exclusion applied).

the extent to which this changing landscape bears upon the interpretation of insurance policy language. The New York Court of Appeals' decision in *J.P. Morgan* is an example. There the court held that a similar policy exclusion did not apply; however, one judge dissented based on reasoning that would support AIG here.[224] Neither that appellate judge's dissent nor AIG's position here were "clearly without any reasonable justification."[225]

AIG's Uninsurability Exclusion argument was less plausible but not made in bad faith. Although the Delaware Supreme Court has indicated that it is unlikely to find claims uninsurable as a matter of public policy absent specific direction from the General Assembly, it has not ruled on the insurability of disgorgement.[226] There are good faith public policy arguments for AIG's position and, though rare, Delaware courts have declined to enforce contract provisions for public policy reasons in other contexts.[227] Accordingly, although the Court "ultimately disagree[s] with [AIG's]

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[224] *See J.P. Morgan*, 183 N.E.3d at 453-67 (Rivera, J., dissenting).

[225] *See Syngenta*, 314 A.3d at 683 (citation omitted).

[226] *See supra* § IV.A.2 (outlining analogous Supreme Court precedent, but only a prior trial court opinion addressing disgorgement directly).

[227] *See, e.g.*, *Lyons Ins. Agency, Inc. v. Wark*, 2020 WL 429114, at *2 (Del. Ch. Jan. 28, 2020) (holding liquidated damages provision in employment agreement unenforceable on public policy grounds); *Abry P'rs V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1064 (Del. Ch. 2006) (holding contract provisions disclaiming intra-contractual fraud invalid as against public policy).

position,"[228] that position is not "so devoid of any justification as to give rise to a claim of bad faith breach of contract."[229]

The Court turns next to AIG's claims-handling conduct and theories on which it previously reserved rights. First, Clear Channel emphasizes a July 2022 internal AIG memo.[230] That memo, whose author the parties have not identified, states that while coverage was being provided for defense costs of individuals, "[d]efense costs and settlement on behalf of the company are not covered under the policy."[231] It further reads that "[r]esolution strategy is to allow the company to continue its negotiations to settle the matter and to pay the portion of defense fees which are incurred on behalf of the individuals."[232] To the extent Clear Channel argues this memo shows bad faith because AIG did not have a reasonable basis for its view on indemnity coverage at the time, that argument fails. The reasonableness of an insurer's coverage position is assessed "at the time of the denial."[233] Here, AIG did

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[228] *Guaranteed Rate*, 305 A.3d at 350.

[229] *Green*, 308 A.3d at 145.

[230] *See* Clear Channel Good Faith Ans. Br. at 21, 26-27, 34-35 (citing Clear Channel Indemnity Op. Br. Ex. DD at '606-07).

[231] Clear Channel Indemnity Op. Br. Ex. DD at '606 (further stating that "[t]here is no coverage for the entity").

[232] *See id.* at '607.

[233] *See Murdock*, 248 A.3d at 910; *see also Syngenta*, 314 A.3d at 671-72, 683-84 (assessing reasonableness "[a]t the time [the insurer] denied coverage," which was when, after having previously agreed to cover defense costs, the insurer filed suit requesting declaratory judgment that it was not obligated to provide coverage).

not deny indemnity coverage until January 2024, when it responded to the September 2023 letter in which Clear Channel sought indemnity.[234] Nor could AIG have provided a final indemnity coverage position in July 2022, because the SEC settlement terms ultimately were not finalized until more than a year later.[235]

Clear Channel also contends that AIG acted in bad faith by failing to communicate the indemnity position reflected in the memo or to investigate until the time of the SEC settlement.[236] However, prior to entry of the Cease-and-Desist Order, AIG had no duty to indemnify, as such a duty "only covers those claims that ultimately invoke the policy's coverage after liability is finalized."[237] Around the time of the memo, the parties were engaged primarily regarding the scope and

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[234] *See* Clear Channel Ans. Brs. Ex. 48 at '178-80 (AIG January 2024 letter denying indemnity coverage on grounds that SEC disgorgement was uncovered penalty and uninsurable); AIG Good Faith Op. Br. Ex. U at '418-19 (seeking indemnity for disgorgement and interest in proposed settlement); *see also* Clear Channel Good Faith Ans. Br. at 13, 24 (asserting "AIG denied indemnity coverage" "[i]n January 2024").

[235] Even assessing AIG's knowledge at the time of the July 2022 memo, it would have been reasonable for AIG to believe that there may not be indemnity coverage for a future SEC settlement. As Clear Channel acknowledges, AIG was previously aware that the settlement under negotiation "would involve a penalty and disgorgement of profits." *See* Clear Channel Good Faith Ans. Br. at 10 (quoting March 24, 2022 claim notes in AIG Good Faith Op. Br. Ex. V at '454). As explained above, AIG's position that disgorgement is not covered, either as a penalty or as uninsurable, is not without reasonable justification.

[236] *See, e.g.*, Clear Channel Good Faith Ans. Br. at 21-22.

[237] *See In re AmerisourceBergen Corp. (n/k/a Cencora) Del. Ins. Litig.*, 2024 WL 5203047, at *10 (Del. Super. Dec. 23, 2024) (citation omitted).

reasonableness of response costs, as the duty to reimburse such costs for individuals had arisen.[238] AIG did not act clearly without reasonable justification by not communicating or further investigating potential indemnity obligations that would not arise until over a year later. Nor does the memo show "egregious conduct" required to submit a claim for extracontractual damages to a jury.[239] Moreover, even if AIG's delay in communicating and investigating were indicative of an improper motive,[240] where, as here, "reasonable grounds for the denial exist," "an insurer's purported motive, as alleged by the insured, is irrelevant."[241]

Second, Clear Channel asserts that AIG acted in bad faith by "reserv[ing] rights" and then asserting affirmative defenses based on the theory that Clear Channel ceased to be an "**Organization**" when it separated from iHeart.[242] Much of Clear Channel's argument is based on its assertion that AIG had previously

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[238] As Clear Channel notes, prior to August 2023, AIG's claim notes "pertain[ed] solely to the individual response costs." *See* Clear Channel Good Faith Ans. Br. at 14.

[239] *See Tackett*, 653 A.2d at 266.

[240] *See, e.g.*, Clear Channel Good Faith Ans. Br. at 23, 29 (contending that "AIG's silence was not an accident" and, "[b]ased on the timing alone," a jury could conclude AIG's coverage positions "were not the product of an honest claim evaluation" but were instead "advanced solely to defend AIG's bottom line and improperly dilute Clear Channel's coverage benefit").

[241] *See Syngenta*, 314 A.3d at 684 (citing *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 368-70 (Del. Super. 1982)).

[242] *See* Clear Channel Good Faith Ans. Br. at 24-26, 28-29.

"acknowledged" the iHeart Separation Agreement did not affect rights to coverage.[243] But that purported acknowledgment was made "based on [Clear Channel's broker's] representations" and agreement to proceed with payment, not an agreement on the issue's merits.[244] Clear Channel also contends AIG's position was "irreconcilable with decades of insurance industry custom and practice."[245] But it does not engage with Clear Channel's plain reading of the Policy language.[246] AIG's reservation of rights prior to litigation does not amount to egregious conduct. Nor was its assertion of affirmative defenses it later withdrew an "extraordinary case[]" of bad faith litigation conduct.[247]

Last, Clear Channel asserts that AIG acted in bad faith by reserving rights regarding Clear Channel's cooperation and reasonableness.[248] However, merely reserving rights on this issue does not amount to bad faith when AIG denied coverage

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[243] *Id.* at 25-26.

[244] *See* Clear Channel Ans. Brs. Ex. 30 at '822.

[245] Clear Channel Good Faith Ans. Br. at 25.

[246] *See* AIG Good Faith Op. Br. at 26-27. Clear Channel suggests that "AIG's corporate designee had to confirm" that the Policy covers "former subsidiaries for acts taken while they were a subsidiary." Clear Channel Good Faith Ans. Br. at 25 (emphasis omitted) (citing Clear Channel Ans. Brs. Ex. 49 at 42:23-43:3). Yet the deposition testimony Clear Channel cites says only that "AIG's D&O policies typically cover subsidiaries of the named insured." Clear Channel Ans. Brs. Ex. 49 at 42:23-43:3. It does not say that this Policy covers former subsidiaries after they cease to be subsidiaries.

[247] *RBC Cap. Mkts.*, 129 A.3d at 877 (citation omitted).

[248] *See* Clear Channel Good Faith Ans. Br. at 26, 29.

on two "separate bas[e]s" for which it had reasonable justification.[249] Moreover, although Clear Channel asserts that AIG only asked for general updates on the investigation, it was not unreasonable for AIG to believe that Clear Channel should have provided it with details of a settlement offer before negotiations had reached the point where the SEC would "not agree to any further negotiation" of the monetary terms.[250]

For the reasons explained previously, the Court ultimately disagrees with AIG's coverage positions on indemnity. Yet, AIG's coverage defenses were not clearly without reasonable justification, and its claims-handling conduct was not so egregious as to bring a claim of bad faith before a jury. Accordingly, AIG's motion for summary judgment on Clear Channel's "Breach of the Duty of Good Faith and Fair Dealing" count is granted.

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[249] *See Syngenta*, 314 A.3d at 684.

[250] *See* AIG Good Faith Op. Br. Ex. BB at '166. Although the statement of facts in Clear Channel brief discusses delays in AIG's payment of response costs for individuals, *see, e.g.*, Clear Channel Good Faith Ans. Br. at 6-8, its argument does not assert that these delays show bad faith. Rather, consistent with Clear Channel's representations to the Court when it sought to amend its complaint, it appears that Clear Channel raises these delays as "context." *See* AIG Good Faith Op. Br. Ex. FF at 23:11-18. The Court has considered this context when evaluating Clear Channel's arguments.

V. CONCLUSION

For the foregoing reasons, the Court rules on the parties' summary judgment motions as follows:

- Clear Channel's Motion on Indemnity: **GRANTED**.
- AIG's Motion on Indemnity: **DENIED**.
- AIG's Motion on Response Costs: **DENIED AS MOOT**.
- AIG's Motion on Good Faith: **GRANTED**.

The parties shall confer regarding any further proceedings required to close this matter.

IT IS SO ORDERED.

/s/ *Patricia A. Winston*
Patricia A. Winston, Judge