

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

COMMAVE THERAPEUTICS SA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 2024-0920-LWW
	)	
ZEVRA THERAPEUTICS, INC.,	)	
	)	
Defendant.	)	

**MEMORANDUM OPINION**

Date Submitted: September 22, 2025

Date Decided: December 31, 2025

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**WILL, Vice Chancellor**

Plaintiff Commave Therapeutics SA moves for partial summary judgment regarding two breaches of its license agreement with defendant Zevra Therapeutics, Inc. The license agreement grants Commave the exclusive right to develop and commercialize certain pharmaceutical products. In Count I, Commave alleges that Zevra violated exclusivity covenants by developing a competing drug candidate. In Count VI, Commave alleges that Zevra violated Commave's rights of first negotiation and first refusal by pledging the license agreement as collateral for a 2024 loan.

The relevant provisions of the license agreement are unambiguous. Under the plain text, the new drug candidate is a prohibited competing product, and the 2024 credit transaction activated mandatory notice and negotiation procedures. Zevra's legal and affirmative defenses fail as a matter of law. Commave's motion is granted.

## **I. BACKGROUND**

Unless otherwise noted, the following background is drawn from undisputed facts in the pleadings and documentary exhibits the parties submitted.<sup>1</sup>

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<sup>1</sup> See Verified Compl. for Inj. Relief, Specific Performance, Declaratory J., and Damages (Dkt. 1) ("Compl."); Def.'s Answer to Pl.'s Verified Compl. for Inj. Relief, Specific Performance, Declaratory J. and Damages (Dkt. 42) ("Answer").

Exhibits to the Transmittal Affidavit of Elizabeth J. Freud, Esq. in Support of Plaintiff's Opening Brief in Support of Its Motion for Partial Summary Judgment (Dkt. 56) are cited as "Pl.'s Ex. \_." Exhibits to the Transmittal Affidavit of Christopher D. Renaud, Esq. in Support of Defendant's Opening Brief in Support of Its Motion for Partial Summary Judgment (Dkt. 53) are cited as "Def.'s Ex. \_."

## **A. The License Agreement**

Plaintiff Commave Therapeutics SA is a Swiss limited company.<sup>2</sup> Defendant Zevra Therapeutics, Inc. is a Delaware corporation.<sup>3</sup>

In September 2019, the parties entered into a Collaboration and License Agreement (the “License Agreement”).<sup>4</sup> Under that agreement, Commave acquired from Zevra “an exclusive license to develop, manufacture, and commercialize” pharmaceutical products being developed by Zevra that “contain[ed] one or more of the compounds” methylphenidate (“d-MPH”) and serdexmethylphenidate (“SDX”), a prodrug of d-MPH.<sup>5</sup> Commave currently commercializes one such product, Azstarys, which contains both d-MPH and SDX.<sup>6</sup>

## **B. Key Contractual Provisions**

The License Agreement contains two sets of obligations central to this dispute: (1) exclusivity regarding competing products, and (2) restrictions on the assignment of rights to third parties.

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<sup>2</sup> Compl. ¶ 16.

<sup>3</sup> *Id.* ¶ 17; Answer ¶ 17.

<sup>4</sup> Pl.’s Ex. 1 (Collaboration and License Agreement) (“License Agreement”).

<sup>5</sup> *Id.* at 1. Commave is defined as the “Company” and Zevra is defined as “KemPharm” in the License Agreement. *Id.*

<sup>6</sup> *See* Answer ¶ 1.

## 1. Exclusivity and Product Rights

Section 2.5 of the License Agreement prohibits Zevra from developing or commercializing any “Competing Product” without Commave’s consent.<sup>7</sup> A Competing Product is “any pharmaceutical product that contains any prodrug of methylphenidate,” such as SDX.<sup>8</sup> But the definition carves out a product candidate called “KP879,” which is defined in Section 1.42 of the License Agreement.<sup>9</sup>

The License Agreement also grants Commave rights regarding “Additional Product[s],” defined to include pharmaceutical products under development by Zevra containing SDX.<sup>10</sup> Under Section 2.6, Commave has an exclusive option to license such Additional Products as a “Product”—a term defined in Section 1.53.<sup>11</sup> If Commave were to exercise this option, it would gain exclusive rights to the Additional Product, subject to the parties reaching mutual agreement on economic

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<sup>7</sup> License Agreement § 2.5(a); *see infra* note 54 and accompanying text (quoting Section 2.5(a)).

<sup>8</sup> License Agreement §§ 1.13, 2.5; *see also* Pl.’s Ex. 3 (Def.’s Resps. and Objs. to Pl.’s First Reqs. for Admis.) (“Zevra RFA Resps.”) No. 2 (admitting that SDX is a prodrug of d-MPH).

<sup>9</sup> License Agreement §§ 1.13, 1.42; *see infra* note 65 and accompanying text (quoting Section 1.42).

<sup>10</sup> License Agreement § 1.2 (defining “Additional Product” as “any other pharmaceutical product . . . contain[ing] or compri[sing], in part or in whole, any Compound”); *see also id.* § 1.14 (defining “Compound” to mean “SDX . . . and any prodrugs of . . . methylphenidate”).

<sup>11</sup> License Agreement § 2.6 (discussing an “Additional Product Option”); *id.* § 1.53 (defining “Product”); *see infra* notes 69, 82, and accompanying text.

terms.<sup>12</sup> But even if Commave declined the option, Section 2.7 grants it a product-related right of first refusal to match any third-party offer Zevra receives to license or commercialize an Additional Product.<sup>13</sup>

## 2. Assignment and Transfer Restrictions

Section 15.5 of the License Agreement restricts the parties from assigning their rights under the License Agreement.<sup>14</sup> Section 15.5(c) governs “Payment Assignment[s],” requiring Zevra to first notify Commave if it decides to sell or transfer its right to receive payments under the License Agreement to a third party.<sup>15</sup>

Upon such notice, Commave enjoys two procedural rights. First, it has a right of first negotiation (“ROFN”) to exclusively negotiate for 30 days to acquire those rights.<sup>16</sup> Second, if negotiations fail, Commave has an assignment-related right of first refusal (“ROFR”) to match the material terms of any third-party offer.<sup>17</sup>

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<sup>12</sup> License Agreement § 2.6.

<sup>13</sup> *Id.* § 2.7.

<sup>14</sup> *Id.* § 15.5.

<sup>15</sup> *Id.* § 15.5(c); *see infra* note 106 and accompanying text (quoting the notice requirement).

<sup>16</sup> License Agreement § 15.5(c); *see infra* note 107 and accompanying text (quoting the ROFN provision).

<sup>17</sup> License Agreement § 15.5(c); *see infra* note 108 and accompanying text (quoting the ROFR provision).

### C. The 2021 Negotiations and Amendment

In 2021, Zevra sought to license a new drug candidate containing SDX, known as “KP1077,” to a third party in Asia.<sup>18</sup> In July 2021, Zevra notified Commave of an offer to license KP1077 in certain East Asian countries.<sup>19</sup> In September 2021, Commave objected, asserting that the transaction would constitute a “Serious Material Breach” of its exclusivity rights.<sup>20</sup>

The parties engaged in settlement negotiations throughout 2021 and 2022, exploring a deal where Commave would exercise its option for KP1077.<sup>21</sup> During this period, the parties executed an amendment to the License Agreement (the “2021 Amendment”), which narrowed the Section 2.7 product-related ROFR to apply specifically to products containing SDX.<sup>22</sup>

Ultimately, Commave did not acquire KP1077. Nor did Zevra consummate the deal with the third party in Asia.<sup>23</sup>

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<sup>18</sup> Compl. ¶¶ 32, 38; Answer ¶¶ 32, 38.

<sup>19</sup> Compl. ¶ 38; Answer ¶ 38; *see also* Pl.’s Ex. 4 (Def.’s Resps. and Objs. to Pl.’s First Set of Interrogs.) (“Zevra Interrog. Resp.”) No. 1 at 14-15.

<sup>20</sup> Compl. ¶ 42; Answer ¶ 42; *see* License Agreement § 1.59 (defining “Serious Material Breach”); *see also id.* § 13.4(b).

<sup>21</sup> Compl. ¶ 43; Answer ¶ 43.

<sup>22</sup> Pl.’s Ex. 5 (Amendment No. 1 to Collaboration and License Agreement) (“2021 Amendment”) § 8; *see infra* notes 89-90 and accompanying text.

<sup>23</sup> Compl. ¶ 44; Answer ¶ 44; *see* Zevra RFA Resps. No. 12.

#### **D. The KP1077 Dispute**

In early 2024, Zevra made public statements and presentations indicating that it was proceeding with the development of KP1077.<sup>24</sup> In April, Commave sought assurances that Zevra would “honor” Commave’s exclusivity and option rights under the License Agreement.<sup>25</sup>

Zevra responded that “[a]ny rights to KP1077 that Commave might have had under the [License] Agreement . . . have been extinguished.”<sup>26</sup> Zevra claimed that KP1077—because it contained SDX—is the same product as the excluded KP879.<sup>27</sup> It also argued that the License Agreement, as amended by the 2021 Amendment, supported Zevra’s right to commercialize KP1077 independently.<sup>28</sup> Commave rejected this interpretation and declared Zevra’s repudiation a “Serious Material Breach of the [License] Agreement.”<sup>29</sup>

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<sup>24</sup> Compl. ¶ 47; Answer ¶ 47; Zevra Interrog. Resp. No. 1 at 10.

<sup>25</sup> Compl. ¶ 48; Answer ¶ 48; *see* Compl. Ex. D (Apr. 26, 2024 letter) 2.

<sup>26</sup> Compl. ¶ 49; Answer ¶ 49; *see* Pl.’s Ex. 6 (May 29, 2024 letter) 2.

<sup>27</sup> Compl. ¶ 49; Answer ¶ 49; *see* Pl.’s Ex. 6 at 1.

<sup>28</sup> Compl. ¶ 49; Answer ¶ 49; *see* Pl.’s Ex. 6 at 1-2.

<sup>29</sup> Compl. ¶ 50; Answer ¶ 50; *see* Compl. H (July 19, 2024 letter) 3.

## **E. The Credit Agreement Dispute**

Separately, in 2024, Zevra entered into a “Credit Agreement” with third-party lenders to raise capital.<sup>30</sup> To secure the loan, Zevra granted the lenders a first-priority perfected lien on, and security interest in, substantially all its assets.<sup>31</sup> It granted “a continuing security interest in any and all right, title and interest” in collateral, whether then owned or later acquired by Zevra, including “all license agreements . . . of any Intellectual Property.”<sup>32</sup>

Commave objected in April 2024, asserting that the pledge of collateral constituted an assignment or transfer that invoked its ROFN and ROFR in Section 15.5(c) of the License Agreement.<sup>33</sup> Zevra had not provided notice to Commave before executing the Credit Agreement, later directing Commave to public filings for details of the transaction.<sup>34</sup>

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<sup>30</sup> Pl.’s Ex. 2 (Credit Agreement among Zevra, Certain Subsidiaries, and Lenders) (“Credit Agreement”).

<sup>31</sup> See Compl. ¶ 55; Answer ¶ 55; Def.’s Ex. 2 (U.S. Security Agreement) (“Security Agreement”); *see also* Zevra RFA Resps. Nos. 23-24 (admitting its entry into the Credit Agreement and Security Agreement).

<sup>32</sup> Security Agreement § 2.

<sup>33</sup> Compl. ¶ 56; Answer ¶ 56; *see* Pl.’s Ex. 7 (Apr. 26, 2024 letter) 2.

<sup>34</sup> Compl. ¶ 57; Answer ¶ 57; *see* Pl.’s Ex. 8 (May 29, 2024 letter) 1.

## **F. This Litigation**

On September 4, 2024, Commave filed this litigation against Zevra, advancing seven contract-based claims, and seeking damages, declaratory relief, and equitable relief.<sup>35</sup> Zevra moved to dismiss all claims against it, which I denied in a February 12, 2025 bench ruling.<sup>36</sup> On March 14, Zevra answered the complaint, raising seven affirmative defenses.<sup>37</sup>

On July 17, the parties cross-moved for partial summary judgment.<sup>38</sup> Briefing was completed on September 5.<sup>39</sup> Oral argument on the cross-motions was presented on September 22, and the matter was taken under advisement.<sup>40</sup>

## **II. LEGAL ANALYSIS**

Under Court of Chancery Rule 56, summary judgment is granted only if “there is no genuine issue as to any material fact and . . . the moving party is entitled

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<sup>35</sup> Compl. ¶¶ 64-118.

<sup>36</sup> Tr. of Feb. 12, 2025 Telephonic Rulings of the Court (Dkt. 41).

<sup>37</sup> Answer 57-59.

<sup>38</sup> Pl.’s Opening Br. in Supp. of Mot. for Partial Summ. J. (Dkt. 55) (“Pl.’s Opening Br.”); Def.’s Opening Br. in Supp. of Mot. for Partial Summ. J. (Dkt. 53) (“Def.’s Opening Br.”).

<sup>39</sup> Pl.’s Answering Br. in Opp’n to Def.’s Mot. for Partial Summ. J. (Dkt. 62) (“Pl.’s Answering Br.”); Def.’s Answering Br. in Opp’n to Pl.’s Partial Mot. for Summ. J. (Dkt. 63) (“Def.’s Answering Br.”); Def.’s Reply Br. in Supp. of Mot. for Partial Summ. J. (Dkt. 69) (“Def.’s Reply Br.”); Pl.’s Reply in Further Supp. of Mot. for Partial Summ. J. (Dkt. 70) (“Pl.’s Reply Br.”).

<sup>40</sup> Dkt. 76.

to a judgment as a matter of law.”<sup>41</sup> When parties cross-move for summary judgment, “the court must examine each motion separately.”<sup>42</sup> “[F]acts must be viewed in the light most favorable to the nonmoving party and the moving party has the burden of demonstrating that there is no material question of fact.”<sup>43</sup>

Commave seeks partial summary judgment on Count I (whether KP1077 is a Competing Product subject to Section 2.5) and Count VI (whether Zevra breached Section 15.5(c)) of its complaint.<sup>44</sup> For Count VI, it seeks summary judgment solely on the issue of liability.<sup>45</sup> Zevra cross-moves for summary judgment on Count VI and seeks summary judgment on Count VII (breach of the implied covenant of good faith and fair dealing).<sup>46</sup>

The issues raised in the motions turn on contract interpretation and are “readily amenable to summary judgment” because “proper interpretation of

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<sup>41</sup> Ct. Ch. R. 56(c).

<sup>42</sup> *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 167 (Del. Ch. 2003).

<sup>43</sup> *Senior Tour Players 207 Mgmt. Co. v. Golftown 207 Hldg. Co.*, 853 A.2d 124, 126 (Del. Ch. 2004); *see also Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 241 (Del. 2009) (“The facts, and all reasonable inferences, must be considered in the light most favorable to the non-moving party.”).

<sup>44</sup> Pl.’s Opening Br. 2.

<sup>45</sup> If summary judgment is granted on this issue, Commave intends to “focus on remedies and whether Zevra committed a Serious Material Breach” in the next stage of the case. *Id.* at 4.

<sup>46</sup> Def.’s Opening Br. 4-5.

language in a contract . . . is treated as a question of law.”<sup>47</sup> When resolving such matters, the court “will grant summary judgment in two scenarios: (1) when the contract is unambiguous, or (2) when the extrinsic evidence fails to create a triable issue of material fact.”<sup>48</sup> Absent ambiguity, the court must “interpret contract terms according to their plain, ordinary meaning.”<sup>49</sup>

As discussed below, I conclude that KP1077 is a Competing Product and grant summary judgment on Count I in Commave’s favor. As for Count VI, I conclude that Zevra breached Section 15.5(c) of the License Agreement and grant partial summary judgment to Commave on liability. Accordingly, I need not reach Count VII regarding the implied covenant of good faith and fair dealing, as the finding of an express breach in Count VI moots that alternative claim.<sup>50</sup>

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<sup>47</sup> *Tetragon Fin. Gp. Ltd. v. Ripple Labs Inc.*, 2021 WL 1053835, at \*3 (Del. Ch. Mar. 19, 2021) (first quoting *Barton v. Club Ventures Invs. LLC*, 2013 WL 6072249, at \*5 (Del. Ch. Nov. 19, 2013); and then quoting *Pellaton v. Bank of N.Y.*, 592 A.2d 473, 478 (Del. 1991)).

<sup>48</sup> *Julius v. Accurus Aerospace Corp.*, 2019 WL 5681610, at \*7 (Del. Ch. Oct. 31, 2019), *aff’d*, 241 A.3d 220 (Del. 2020); *see GMG Cap. Invs., LLC v. Athenian Venture P’rs I, L.P.*, 36 A.3d 776, 784 (Del. 2012) (“[I]n a dispute over the proper interpretation of a contract, summary judgment may not be awarded if the language is ambiguous and the moving party has failed to offer uncontested evidence as to the proper interpretation.”).

<sup>49</sup> *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012).

<sup>50</sup> *See Fisk Ventures, LLC v. Segal*, 2008 WL 1961156, at \*10 (Del. Ch. May 7, 2008) (“[B]ecause the implied covenant is, by definition, *implied*, and because it protects the *spirit* of the agreement rather than the form, it cannot be invoked where the contract itself expressly covers the subject at issue.”).

### **A. Count I: KP1077 and Exclusivity**

Commave argues that KP1077 is a Competing Product under the License Agreement because it contains SDX.<sup>51</sup> Zevra opposes the motion, asserting that (1) KP1077 is excluded from that definition because it is the same product as KP879, (2) KP1077 qualifies as an Additional Product, and (3) the 2021 Amendment extinguished Commave's exclusivity rights.<sup>52</sup> Alternatively, Zevra asserts several affirmative defenses that it contends prevent Commave from obtaining summary judgment on Count I.<sup>53</sup>

Commave's interpretation of Sections 1.13 and 2.5 reflects the unambiguous, plain meaning of the License Agreement. Zevra's interpretations, by contrast, are unmoored from the License Agreement's text. Its affirmative defenses are also foreclosed.

#### **1. Whether KP1077 is a "Competing Product"**

Section 2.5(a) of the License Agreement prohibits Zevra from commercializing any Competing Product without Commave's consent:

Subject to Section 2.5(b), Section 2.5(c) and Section 2.5(d), during the Term of this Agreement neither Party shall, directly or indirectly, either by itself or through its Affiliates or any arrangement, or series of arrangements, with a Third Party,

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<sup>51</sup> Pl.'s Opening Br. 10-11.

<sup>52</sup> Def.'s Answering Br. 16-30.

<sup>53</sup> *See id.* at 24, 29.

*develop and/or commercialize any Competing Product* in the Territory.<sup>54</sup>

Section 1.13 defines Competing Product as “any pharmaceutical product that contains any prodrug of methylphenidate.”<sup>55</sup> It clarifies that a “Competing Product shall not include KP879.”<sup>56</sup>

As Zevra admits, KP1077 contains SDX.<sup>57</sup> SDX is a prodrug of d-MPH.<sup>58</sup> Thus, KP1077 satisfies the unambiguous definition of Competing Product, and is subject to Commave’s exclusivity rights in Section 2.5.

## 2. Zevra’s Contractual Arguments

Zevra attempts to defeat this result by advancing four legal arguments. First, it argues that KP1077 falls within the specific carve-out for KP879 in the definition of Competing Product because the two share the same formulation.<sup>59</sup> Second, it contends that a proviso in the definition of Product establishes that formulation controls over indication.<sup>60</sup> Third, it claims that KP1077 cannot be a Competing

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<sup>54</sup> License Agreement § 2.5 (emphasis added).

<sup>55</sup> *Id.* § 1.13.

<sup>56</sup> *Id.*

<sup>57</sup> *See* Zevra RFA Resps. No. 1 (admitting that KP1077 contains SDX).

<sup>58</sup> *See id.* at No. 2 (admitting that SDX is a prodrug of d-MPH).

<sup>59</sup> Def.’s Answering Br. 16-17.

<sup>60</sup> *Id.* at 18.

Product because KP1077 meets the separate definition of an Additional Product.<sup>61</sup> Finally, it asserts that the 2021 Amendment to the License Agreement implicitly abrogated Commave’s exclusivity rights.<sup>62</sup>

Each of Zevra’s arguments fails to overcome the unambiguous text of the License Agreement.

a. The KP879 Carve-Out

Zevra asserts that KP1077 is not a Competing Product by invoking the specific carve-out for KP879 in Section 1.13. It argues that because KP1077 and KP879 share the same formulation—their sole active ingredient is SDX—they are the “same product.”<sup>63</sup> Thus, Zevra insists that KP1077 falls within the carve-out.

Zevra is correct insofar as KP1077 and KP879 have the same formulation.<sup>64</sup> But the remainder of its argument fails under the negotiated definition of the excluded term. Section 1.42 of the License Agreement defines KP879 not only by its composition, but also by its intended use:

“KP879” means [Zevra’s] product candidate currently known as KP879, which contains SDX as its sole active pharmaceutical ingredient, *and is being developed as an extended-duration,*

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<sup>61</sup> *Id.* at 16.

<sup>62</sup> *Id.* at 18-19.

<sup>63</sup> *Id.* at 17.

<sup>64</sup> Compare License Agreement § 1.42 (defining KP879 as a “product candidate” that “contains SDX as its sole active pharmaceutical ingredient”), with Zevra RFA Resps. No. 1 (admitting that “KP1077 contains SDX as its sole active pharmaceutical ingredient”).

*agonist replacement therapy for the treatment of Stimulant Use Disorder (“SUD”) . . . .*<sup>65</sup>

KP1077 is not being developed for Stimulant Use Disorder.<sup>66</sup>

To adopt Zevra’s formulation-only approach would require me to ignore the qualifying clause in Section 1.42 on the treatment of SUD. Delaware courts “will not read a contract to render a provision or term ‘meaningless or illusory.’”<sup>67</sup> If the parties intended to exclude *any* product containing SDX, they could have drafted the exclusion to cover the compound itself. They chose instead to define the excluded candidate (KP879) by its development path and medical indication. Because KP1077 does not satisfy this narrow definition, it is not KP879, and the exclusion does not apply.

b. The “Product” Proviso

Zevra next argues that a proviso at the end of the License Agreement’s definition of Product proves that formulation controls over indication.<sup>68</sup> Section 1.53 of the License Agreement defines “Product” to mean:

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<sup>65</sup> License Agreement § 1.42 (emphasis added).

<sup>66</sup> See Zevra RFA Resps. No. 3 (admitting that “KP1077 is not currently being developed to treat patients with Stimulant Use Disorder”).

<sup>67</sup> *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (citation omitted). Zevra notes that a “product can have multiple indications and be used to treat different conditions and remain the same underlying product.” Def.’s Answering Br. 17. Perhaps. But absent ambiguity, this court “will give priority to the parties’ intentions as reflected in the four corners of the agreement.” *GMG Cap.*, 36 A.3d at 779.

<sup>68</sup> See Def.’s Answering Br. 18.

[A]ny Initial Product, any Additional Product which [Commave] elects to include within the scope of this Agreement pursuant to [Commave's] exercise of its Additional Product Option in accordance with Section 2.6, or any ROFR Product which [Commave] elects to include within the scope of this Agreement . . . pursuant to Section 2.7 . . . .

For clarity, for the purposes of this Agreement: . . . ***any Product with a specific formulation which is used for the treatment of a particular indication shall be considered the same Product when it is used for the treatment of a different indication.***<sup>69</sup>

Because “any Product with a specific formulation . . . shall be considered the same Product,” Zevra asserts that KP879 and KP1077, which both have SDX as the sole active ingredient, are the same Product.<sup>70</sup>

The referenced proviso, however, applies only to the defined term Product, which is limited to drug candidates explicitly licensed to Commave under the License Agreement.<sup>71</sup> Neither KP879 nor KP1077 satisfies that definition. The definition of Product specifically includes any “Initial Product,” which is defined as “KP415 or KP484”—not KP879.<sup>72</sup> And though the definition of Additional Product encompasses KP879, Section 1.53 specifies that Product covers only those

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<sup>69</sup> License Agreement § 1.53 (emphasis added).

<sup>70</sup> Def.'s Answering Br. 18.

<sup>71</sup> See License Agreement § 1.53.

<sup>72</sup> *Id.* §§ 1.34, 1.53. Neither KP415 nor K484 can be deemed the same product as KP879 because they are not solely comprised of SDX. See *id.* §§ 1.40-1.41 (defining “KP415” and “KP484”).

“Additional Product[s]” that “[Commave] elects to include within the scope of th[e] [License] Agreement.”<sup>73</sup> Similarly, “ROFR Product” constitutes a Product only if Commave exercises its ROFR, at which point it is “deemed a Product and licensed to [Commave] under the terms and conditions of th[e] [License] Agreement.”<sup>74</sup>

Zevra acknowledges that neither KP879 nor KP1077 are licensed under the License Agreement.<sup>75</sup> Thus, the defined term Product, including its unique proviso regarding indications, is irrelevant to the definition of KP879.<sup>76</sup>

c. KP1077 as an “Additional Product”

Next, Zevra argues that because KP1077 meets the definition of Additional Product in Section 1.2 of the License Agreement, it cannot be a Competing

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<sup>73</sup> *Id.* §§ 1.2, 1.53; *see infra* note 79.

<sup>74</sup> License Agreement § 2.7

<sup>75</sup> *See* Def.’s Answering Br. 18 (acknowledging that KP1077 is not a “Product”); *id.* at 9-10.

<sup>76</sup> This result is congruent with the fact that KP879’s definition does not reference the capitalized term Product. KP879 is only referred to as a “product [lowercase] candidate.” License Agreement § 1.42; *see RCM LS II, LLC v. Lincoln Circle Assocs., LLC*, 2014 WL 3706618, at \*8 (Del. Ch. July 28, 2014) (noting that the “omission of a term in a contract ‘speaks volumes’ when compared to included terms” (citation omitted)); *see infra* note 119. To read the proviso as including KP879 would essentially expand it to cover any drug candidate that uses SDX, leaving other aspects of its definition, such as its indication, meaningless and illusory. *See supra* note 67.

Product.<sup>77</sup> Implicit in this argument is the premise that the two defined terms are mutually exclusive because they involve different obligations.<sup>78</sup>

There is no dispute that KP1077 qualifies as an Additional Product, which is defined to include:

(a) KP879, (b) KP922, or (c) any other pharmaceutical product, in any dosage form, formulation, presentation or package configuration that is developed by or on behalf of [Zevra] . . . and (i) contains or comprises, in part or in whole, any Compound . . . .<sup>79</sup>

“Compound” refers to “SDX, d-MPH, amphetamine and any prodrugs of amphetamine or methylphenidate . . . .”<sup>80</sup> KP1077 contains SDX; it is an Additional Product.<sup>81</sup> As such, KP1077 is subject to an “Additional Product Option” in Section 2.6, which grants Commave an “exclusive option to include Additional Products as Product(s) [licensed] under th[e] [License] Agreement.”<sup>82</sup>

But nothing in the License Agreement bars a drug candidate from being both an Additional Product and a Competing Product. Indeed, because both definitions

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<sup>77</sup> Def.’s Answering Br. 16.

<sup>78</sup> *See* Tr. of Sept. 22, 2025 Oral Arg. on Cross-Mots. for Partial Summ. J. (Dkt. 80) 13; *see also* Def.’s Answering Br. 17.

<sup>79</sup> License Agreement § 1.2.

<sup>80</sup> *Id.* § 1.14.

<sup>81</sup> *See id.* §§ 1.2, 1.13.

<sup>82</sup> *Id.* § 2.6

involve the presence of a “prodrug of methylphenidate,” virtually any Competing Product developed by Zevra will also be an Additional Product.

Zevra’s argument improperly treats the obligations under Section 2.5 and Section 2.6 as competing when they are, in fact, harmonious.<sup>83</sup> Under Section 2.5, Zevra cannot develop or commercialize a Competing Product without Commave’s consent.<sup>84</sup> If Commave grants that consent, then Section 2.6 requires Zevra to provide a data package upon the completion of a Phase 1 study, after which Commave may exercise its exclusive option to license the drug.<sup>85</sup>

Sections 2.5 and 2.6 therefore address different non-conflicting rights and obligations that apply depending on the circumstances.<sup>86</sup> Section 2.5 prevents Zevra from competing. Section 2.6, by contrast, allows Commave to acquire the rights to new developments. If the terms were mutually exclusive, as Zevra suggests, then nothing developed by or on behalf of Zevra could be a Competing Product. Commave’s exclusivity rights would be meaningless, contrary to settled contract interpretation principles.<sup>87</sup>

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<sup>83</sup> See *Martin Marietta Mat’ls, Inc. v. Vulcan Mat’ls Co.*, 68 A.3d 1208, 1225 (Del. 2012) (“[A]ll contract provisions [should] be harmonized and given effect where possible.”).

<sup>84</sup> License Agreement § 2.5; see Zevra RFA Resps. No. 20.

<sup>85</sup> See License Agreement § 2.6.

<sup>86</sup> See Pl.’s Reply Br. 14 n.5.

<sup>87</sup> See *Osborn*, 991 A.2d at 1159; *Sonitrol Hldg. Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992).

d. The 2021 Amendment

Zevra's final argument hinges on a 2021 Amendment to the License Agreement, which it asserts abrogated Commave's exclusivity rights under Section 2.5(a) regarding drugs containing SDX.<sup>88</sup> Zevra points to the amendment of Section 2.7(a) of the License Agreement, which changed the provision's title from "Right of First Refusal" to "Right of First Refusal for Each Additional Product Containing SDX."<sup>89</sup> In Zevra's view, this grant of a specific right to Commave to "acquire, license and/or commercialize any Additional Product which contains SDX and for which [Commave] does not elect the Additional Product Option" implies Zevra retained the underlying right to develop those products.<sup>90</sup>

This argument is meritless. Section 9(a) of that 2021 Amendment provides: "[e]xcept as expressly amended in this Amendment, the License Agreement shall remain unchanged and continue in full force and effect as provided therein."<sup>91</sup> By its terms, the 2021 Amendment only amends Section 2.7 of the License Agreement by narrowing the scope of the product ROFR to other products that contain SDX.

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<sup>88</sup> Def.'s Answering Br. 18-19.

<sup>89</sup> *See* 2021 Amendment § 8; License Agreement § 2.7; *see also* Def.'s Answering Br. 18-19.

<sup>90</sup> 2021 Amendment § 8; *see* Def.'s Answering Br. 18.

<sup>91</sup> 2021 Amendment § 9(a).

This term implicates obligations wholly separate from those addressed in Section 2.5 of the License Agreement.

The 2021 Amendment cannot be read to change a section of the License Agreement it did not even reference. If these sophisticated parties had intended to eliminate Commave's exclusivity rights, they should have done so expressly.<sup>92</sup> Zevra's theory that a substantive change to Section 2.5 was achieved through a limited change to Section 2.7 finds no support in the contract language.<sup>93</sup> Because the 2021 Amendment ratified the remainder of the License Agreement, the exclusivity provision remains in effect.

### 3. Zevra's Affirmative Defenses

In the alternative, Zevra raises several affirmative defenses—including the statute of limitations, laches, estoppel, waiver, and unclean hands—that it contends prevent Commave from receiving summary judgment on Count I.<sup>94</sup> I reject each such defense.

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<sup>92</sup> *E.g., Abry P'rs V, L.P. v. F&W Acq. LLC*, 891 A.2d 1032, 1061-62 (Del. Ch. 2006) (noting that sophisticated parties can “make their own judgments about the risk they should bear,” and Delaware courts will hold them to their “freely negotiated contracts”).

<sup>93</sup> *Cf. Terex Corp. v. S. Track & Pump, Inc.*, 117 A.3d 537, 544 n.27 (Del. 2015) (explaining the fundamental legal principle that drafters do not “hide elephants in mouseholes” (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001))).

<sup>94</sup> *See* Def.'s Answering Br. 29.

Zevra’s affirmative defenses rely on the same factual predicate: Zevra’s third-party outreach to Asian investors in 2021.<sup>95</sup> But the transaction contemplated by that outreach was never consummated, and it does not affect Zevra’s separate actions in 2024 that are the subject of this case.<sup>96</sup> Commave is not trying to unwind the 2021 negotiations or seek damages for them in this lawsuit. Its claims arise solely from Zevra’s conduct in 2024.<sup>97</sup> Consequently, the claims cannot be time-barred. There is also no “immediate and necessary relation” between the 2021 events and current dispute to support an unclean hands defense.<sup>98</sup>

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<sup>95</sup> *Id.* at 24-30. This is a generous interpretation of the factual record, given the sparsity of the pleadings. Zevra’s Answer is threadbare on allegations supporting the affirmative defenses. For example, Zevra makes the conclusory assertion that the counts are time-barred “based on the parties’ years-long negotiations and discussions related to KP1077.” Answer 59. Regarding equitable estoppel and laches, Zevra pleads almost nothing showing “detrimental reliance”—a necessary element of both. *See, e.g., Hyetts Corner, LLC v. New Castle Cnty.*, 2021 WL 4166703, at \*10 (Del. Ch. Sept. 14, 2021) (noting that detrimental reliance must be “reasonable and justified” for equitable estoppel (citation omitted)).

<sup>96</sup> *See* Zevra RFA Resps. No. 12 (“Zevra admits that it did not ultimately enter into a license agreement for KP1077 with the third party . . . .”); *see also AM Gen. Hldgs., LLC v. The Renco Gp., Inc.*, 2016 WL 4440476, at \*13 (Del. Ch. Aug. 22, 2016) (noting that separate breaches are treated independently for the purpose of timeliness); *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 2012 WL 3201139, at \*18 (Del. Ch. Aug. 7, 2012) (“[A] separate independent violation of the same contract provision does not ‘arise’ out of the same conduct, transaction or occurrence as did the first, unrelated violation.”).

<sup>97</sup> *See* Compl. ¶¶ 64-118.

<sup>98</sup> *See Del. Sur. Co. v. Layton*, 50 A. 378, 378 (Del. Ch. 1901) (rejecting an “unclean hands” argument because of a lack of connection between the conduct and subject matter of the suit); *see also Nakahara v. NS 1991 Am. Tr.*, 718 A.2d 518, 523 (Del. Ch. 1998) (requiring an “immediate and necessary relation” to the litigation for unclean hands (citation omitted)).

Even if the 2021 events were relevant, Commave’s conduct during that period was consistent with its current position. In 2021, Commave asserted its rights by attempting to negotiate a deal regarding the potential transaction.<sup>99</sup> The fact that it did not immediately sue over an unconsummated deal does not mean it waived its rights or is estopped from asserting claims about separate acts three years later.<sup>100</sup>

The no-waiver provision in Section 15.10 of the License Agreement further undermines Zevra’s affirmative defenses:

Any delay in enforcing a Party’s rights under this Agreement or any waiver as to a particular default or other matter shall not constitute a waiver of such Party’s rights to the future enforcement of its rights under this Agreement, except with respect to an express written and signed waiver relating to a particular matter for a particular period of time.<sup>101</sup>

Delaware courts enforce such non-waiver clauses to ensure that a party does not inadvertently forfeit its contract rights through delay or inaction.<sup>102</sup>

Accordingly, the affirmative defenses fail.

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<sup>99</sup> See *supra* note 20.

<sup>100</sup> See Pl.’s Reply Br. 19 (“[I]t was manifestly unreasonable for Zevra to believe (if it truly did believe) that Commave’s willingness to negotiate in 2021 meant that Zevra had a free pass to globally commercialize KP1077 . . .”).

<sup>101</sup> License Agreement § 15.10.

<sup>102</sup> See *Viking Pump, Inc. v. Liberty Mut. Ins.*, 2007 WL 1207107, at \*27 (Del. Ch. Apr. 2, 2007) (“Non-waiver clauses serve to inform the other contracting party that no individual agent has the authority to waive or alter contract terms. Rather, they make clear that some official act is required in order to actually change the original agreement.”).

Zevra insists that discovery is needed to resolve “competing reasonable interpretations” of the Agreement.<sup>103</sup> I reject this request. Only Commave’s reading of Section 1.13—that any compound containing SDX, except for KP879, is a Competing Product—is reasonable and reflects the plain, unambiguous text. KP1077 is thus a Competing Product subject to the exclusivity obligations of Section 2.5. As none of Zevra’s contractual or affirmative defenses support a different holding, summary judgment is granted to Commave on Count I.

**B. Count VI: The Credit Agreement**

In Count VI, Commave claims that Zevra breached the License Agreement by entering into the Credit Agreement without providing the required notice, depriving Commave of its ROFN and ROFR. Commave moves for summary judgment on Count VI solely on the question of Zevra’s liability.<sup>104</sup> Zevra cross-moves for summary judgment on Count VI, arguing that Commave enjoys no ROFN or ROFR related to the Credit Agreement.<sup>105</sup>

I begin by analyzing the text of Section 15.5(c). I conclude that the Credit Agreement constitutes a Payment Assignment because it involved transferring an interest in Zevra’s payment rights, which implicated Commave’s ROFN and ROFR.

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<sup>103</sup> Def.’s Answering Br. 15.

<sup>104</sup> Pl.’s Opening Br. 13-21.

<sup>105</sup> Def.’s Opening Br. 12-24.

I then address and reject Zevra’s four legal defenses. Because the contract is unambiguous and Zevra’s defenses fail as a matter of law, I grant summary judgment to Commave as to liability on Count VI.

1. Whether the Credit Agreement is a “Payment Assignment”

Section 15.5(c) of the License Agreement provides that if Zevra entered into a Payment Assignment, it had to give written notice to Commave:

[I]f [Zevra] either receives a bona fide offer that its Board of Directors intends to accept, or the Board of Directors of [Zevra] decides to *sell, assign, contribute, convey, grant or otherwise transfer to any Third Party (other than DPDF)* . . . all or any of *[Zevra’s] rights to receive payment and the corresponding royalty reports* under this Agreement (each a “*Payment Assignment*”), then, within (2) Business Days after [Zevra’s] receipt of, or the Board of Directors’ decision with respect to, such Payment Assignment, [Zevra] shall provide [Commave] with written notice (the “Payment Assignment Notice”).<sup>106</sup>

Zevra was then obligated to negotiate exclusively with Commave for 30 days over agreement on a Payment Assignment transaction with Commave as the Counterparty. This ROFN is outlined in Section 15.5(c):

During the Exclusive Period . . . (a) *[Zevra] shall negotiate in good faith with [Commave]* regarding any Payment Assignment proposal which [Commave] elects to deliver to [Zevra] during such period . . . .<sup>107</sup>

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<sup>106</sup> License Agreement § 15.5(c) (emphasis added).

<sup>107</sup> *Id.* (emphasis added).

If the parties did not reach an agreement during that 30-day exclusivity period, Commave had 30 days under Section 15.5(c) to exercise its ROFR to be the counterparty on the same terms:

***Prior to executing any definitive agreement with such Third Party . . . [Zevra] shall provide [Commave] with a written summary of the **material terms of the offer** proposed by such Third Party and [Commave] shall have thirty (30) Business Days following receipt of such written summary from [Zevra] to notify [Zevra] whether or not [Commave] agrees to enter into the Payment Assignment with [Zevra] **on the same economic terms** as offered by such Third Party.***<sup>108</sup>

Commave argues that Zevra’s collateral assignment of its payment rights constitutes a Payment Assignment subject to Section 15.5(c). I agree. Commave’s reading of Section 15.5 is the only reasonable one.

Commave’s ROFN and ROFR are triggered if Zevra’s Board “decides to sell, **assign**, contribute, convey, grant or **otherwise transfer** to any Third Party . . . all or any of [Zevra]’s rights to receive payment and the corresponding royalty reports.”<sup>109</sup> An “assignment” is “[t]he transfer of rights or property,” including “[a]n assignment of property as collateral security for a loan.”<sup>110</sup> The Credit Agreement falls within that scope because it grants “a continuing security interest in any and all right, title

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<sup>108</sup> *Id.* (emphasis added).

<sup>109</sup> *Id.* (emphasis added).

<sup>110</sup> *Assignment*, Black’s Law Dictionary (12th ed. 2024) (citing definitions under both “assignment” and the subsidiary term “collateral assignment”).

and interest of [Zevra]” in collateral including “*all license agreements . . . of any Intellectual Property.*”<sup>111</sup>

Zevra’s argument that the Credit Agreement does not explicitly name “royalty rights” is unavailing.<sup>112</sup> By pledging all license agreements as collateral, Zevra necessarily transferred an interest in the rights arising from those contracts—such as the License Agreement. This bundle of rights includes the right to receive royalty and milestone payments. To hold that a debtor could pledge a contract as collateral while retaining the payment rights that give the contract value would be divorced from commercial reality.

Even if the Credit Agreement is not an “assignment,” it falls comfortably within the broad definition of Payment Assignment, which applies to a decision to “otherwise transfer . . . all or any of Zevra’s rights to receive payment.”<sup>113</sup> The term “transfer” includes parting with “an interest in an asset” such as the “creation of a lien or other encumbrance.”<sup>114</sup> Zevra’s granting of a security interest in its royalty stream was a “transfer” of a property interest because it conveyed a continuing

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<sup>111</sup> Security Agreement § 2.

<sup>112</sup> Def.’s Answering Br. 32 (arguing that Zevra “did not ‘assign’ any royalty or milestone payments . . . to the lenders”).

<sup>113</sup> License Agreement § 15.5(c).

<sup>114</sup> *Transfer*, Black’s Law Dictionary (12th ed. 2024).

security interest in Zevra’s assets to the lenders to secure the debt. It was therefore a Payment Assignment subject to Commave’s rights.<sup>115</sup>

The parties’ treatment of collateral assignments elsewhere in the License Agreement reinforces this interpretation. Zevra argues that the grant of a security interest is excluded from the definition of a Payment Assignment.<sup>116</sup> Yet Section 15.5(c) carves out a prior “collateral assignment” granted to the lender DPDF from that very definition.<sup>117</sup> If Zevra’s reading were correct, this specific exclusion would be rendered mere surplusage.<sup>118</sup> Instead, the maxim of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) instructs that the parties’ decision to exclude one specific collateral assignment implies other collateral assignments—such as the one created by the Credit Agreement—are included within the general rule.<sup>119</sup>

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<sup>115</sup> License Agreement § 15.5(c).

<sup>116</sup> See *infra* Section II.B.2.a.

<sup>117</sup> License Agreement §§ 15.5(a), (c).

<sup>118</sup> See *Osborn*, 991 A.2d at 1159 (explaining that Delaware courts “will read a contract as a whole and [] give each provision and term effect, so as not to render any part of the contract mere surplusage” (quoting *Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010))); see also *In re Mobilactive Media, LLC*, 2013 WL 297950, at \*16 (Del. Ch. Jan. 25, 2013) (“[T]he Carve-Out explicitly excludes ‘non-video based mobile and on-line marketing businesses’ of Silverback and its affiliates in North America. Such a carve-out would be superfluous if Mobilactive’s Business were limited to interactive video programming and interactive video advertising.” (citation omitted)).

<sup>119</sup> See *Active Asset Recovery, Inc. v. Real Est. Asset Recovery Servs., Inc.*, 1999 WL 743479, at \*11 (Del. Ch. Sept. 10, 1999) (citing Arthur L. Corbin, 3 Corbin on Contracts § 552 (1960) for the rule of *expressio unius est exclusio alterius* that “[i]f one subject is

## 2. Zevra's Legal Defenses to Liability

Zevra makes four arguments that it believes exempt it from liability. First, it argues that the Credit Agreement is a security interest rather than a Payment Assignment subject to Section 15.5(c).<sup>120</sup> Second, it asserts that, even if the Credit Agreement activated Commave's ROFN and ROFR, Section 15.5(c) is unenforceable under the Delaware Uniform Commercial Code (UCC).<sup>121</sup> Third, it argues that the Credit Agreement's "Excluded Property" definition carves out the License Agreement from the scope of pledged collateral.<sup>122</sup> And finally, it argues that Section 15.5(d) of the License Agreement makes any assignment in violation of that section "null, void and of no legal effect."<sup>123</sup>

None of Zevra's arguments succeed. They either distort the plain meaning of the License Agreement's unambiguous terms or rely on legal defenses that are inapplicable to the specific rights Commave is asserting.

### a. Security Interest Versus Assignment

Zevra contends that the Credit Agreement created a security interest that pledges certain collateral in the event of a default—not a Payment Assignment

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specifically named . . . it may reasonably be inferred that the subjects not specifically named were intended to be excluded").

<sup>120</sup> Def.'s Opening Br. 20-21.

<sup>121</sup> *Id.* at 13.

<sup>122</sup> *Id.* at 16.

<sup>123</sup> *Id.* at 19 (quoting License Agreement § 15.5(d)).

subject to Section 15.5(c).<sup>124</sup> In support of this distinction, it relies on *In re National Collegiate Student Loan Trusts Litigation*, which observed—in the context of interpreting indentures under New York law—that “sales or assignments” and security interests are distinct.<sup>125</sup>

That may be true as a matter of commercial law.<sup>126</sup> But the License Agreement is a bespoke commercial contract, and the parties’ bargained-for definitions and carve-outs govern over common law defaults.<sup>127</sup> Unlike the standard instruments in *National Collegiate*, Section 15.5(c) defines Payment Assignment broadly to include any decision to “sell, assign . . . or otherwise transfer” payment rights.<sup>128</sup> By including the “otherwise transfer” catch-all and explicitly carving out

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<sup>124</sup> *Id.* at 20-24.

<sup>125</sup> 251 A.3d 116, 156-57 (Del. Ch. 2020).

<sup>126</sup> *See, e.g., Murdock Acceptance Corp. v. Aaron*, 190 Tenn. 416, 425 (1950) (“It is argued that the provision against assignments should not be construed to apply to a transfer of interest by a deed of trust to secure the payment of a debt. Many well considered cases make plain the distinction between the effect of an outright assignment and the effect of a mortgage or deed of trust.”); *Males v. N.Y. Life Ins.*, 48 A.D.2d 50, 53 (N.Y. App. Div. 1975) (“[A]n assignment of an insurance policy as collateral security does not divest the insured or the beneficiary of their general interest in the policy, but merely creates a lien in favor of the assignee to the extent of the debt owed. Once the debt has been paid, the insurance policy continues in effect as if there had been no assignment.”).

<sup>127</sup> *Salamone v. Gorman*, 106 A.3d 354, 370 (Del. 2014) (“Our focus on the actual language agreed to and used by the parties to a contract best promotes ‘parties’ ability to negotiate and shape commercial agreements,’ in keeping with the goal of Delaware law to ‘ensure freedom of contract and promote clarity in the law [and thus] facilitate commerce.’” (citation omitted)).

<sup>128</sup> License Agreement § 15.5(c); *see supra* note 106 and accompanying text.

a prior security interest (DPDF), the parties signaled their intent to capture monetization events that part with an interest in the royalty stream.<sup>129</sup> That is true regardless of whether they fit the technical common-law definition of an assignment of title.

b. The Delaware UCC

Zevra next argues that the ROFR and ROFN are unenforceable under the Delaware Uniform Commercial Code.<sup>130</sup> It relies on Section 9-406(d)(1) of the Delaware UCC, which invalidates any contract term that “prohibits, restricts, or requires the consent of the account debtor” for an assignment.<sup>131</sup> Zevra maintains that Section 15.5(c) of the License Agreement functions as “a restriction on Zevra’s ability to dispose of its rights” in violation of the statute.<sup>132</sup>

This argument ignores the distinction between a legal prohibition and a practical impairment. As the Official Comments to the UCC clarify, Section 9-406(d) “reaches only covenants that prohibit, restrict, or require consents to assignments; it does not override all terms that might ‘impair’ an assignment in

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<sup>129</sup> See *supra* notes 113-114, 117-119 and accompanying text.

<sup>130</sup> Def.’s Opening Br. 13.

<sup>131</sup> 6 *Del. C.* § 9-406(d)(1). UCC Article 9 was “adopted into Delaware law by Del. Code Ann. tit. 6, art. 9.” *Off. Comm. of Unsec. Creds. of Motors Liquid. Co. v. JPMorgan Chase Bank, N.A.*, 103 A.3d 1010, 1013 (Del. 2014) (citation omitted).

<sup>132</sup> Def.’s Opening Br. 13.

fact.”<sup>133</sup> The statute thus treats legal prohibitions differently from mere “practical impairment[s].”<sup>134</sup>

Section 15.5(c) does not prohibit Zevra from assigning its rights or require Commave’s consent to do so. It establishes a set of procedures—a right to negotiate and a right to match terms—that Zevra must honor before the assignment.<sup>135</sup> These obligations may create a “practical impairment” to the speed or ease of a transaction.<sup>136</sup> But they do not function as the type of legal restriction targeted by the UCC.

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<sup>133</sup> U.C.C. § 9-406 cmt. 5 (Am. L. Inst. & Unif. L. Comm’n 2025). The Official Comments are persuasive in interpreting the Delaware UCC. *See Acierno v. Worthy Bros. Pipelining Corp.*, 656 A.2d 1085, 1090-91 (Del. 1995). Commave also correctly notes that the commentary to Section 9-408, which contains a similar statutory restriction, likewise clarifies that the UCC does not override terms that merely “present a practical impairment of the assignment.” U.C.C. § 9-408 cmt. 6. (Am. L. Inst. & Unif. L. Comm’n 2025); *see* 6 *Del. C.* § 9-408(b) (“[A] term in a promissory note or in an agreement between an account debtor and a debtor . . . which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or the account debtor to, the assignment or transfer of, or creation, attachment, or perfection of a security interest . . . is ineffective . . . .” (emphasis added)).

<sup>134</sup> U.C.C. § 9-406 cmt. 5.

<sup>135</sup> *See Santander Bank, N.A. v. Durham Com. Cap. Corp.*, 2016 WL 199408, at \*5 (D. Mass. Jan. 15, 2016) (“[T]he existence of a ‘practical impairment’ in the agreement between an account debtor and an assignor does not mean that the assignment is ineffective. Instead, as comment five explains . . . that subsection overrides only terms that directly prohibit assignment.”); *see also Murdock*, 190 Tenn. at 425-26 (“[A] provision which does not bar assignment but merely provides a method to be followed before the assignment will affect the vendor is not invalid as a restraint of alienation.” (citation omitted)).

<sup>136</sup> Zevra’s reliance on case law regarding anti-assignment provisions is misplaced. *See ImagePoint, Inc. v. JPMorgan Chase Bank, Nat. Ass’n*, 27 F. Supp. 3d 494, 509 (S.D.N.Y. 2014) (addressing an explicit anti-assignment clause that declared assignments “null and void” absent consent). Commave does not seek to enforce the anti-assignment provision

ROFN and ROFR provisions are common features of commercial contracts.<sup>137</sup>

Adopting Zevra’s interpretation would lead to the unreasonable result that all such provisions are unenforceable under the UCC. That sweeping invalidation of accepted commercial rights would be inconsistent with the text and purpose of the Delaware UCC.<sup>138</sup>

Accordingly, Section 9-406(d) does not bar the enforcement of Section 15.5(c).

c. “Excluded Property” under the Credit Agreement

Zevra next argues that the Credit Agreement’s “Excluded Property” provision exempts it from liability.<sup>139</sup> Subsection (d) of that provision excludes from the collateral pool:

[A]ny . . . license, contract or other agreement if the grant of a security interest in such . . . license, contract or other agreement . . . ***is prohibited*** and would result in the termination thereof or

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in Section 15.5(a) or (d) of the License Agreement, but the procedural rights in Section 15.5(c).

<sup>137</sup> See, e.g., *Union Oil Co. of Ca. v. Mobil Pipeline Co.*, 2006 WL 3770834, at \*14 (Del. Ch. Dec. 15, 2006) (“A right of first refusal is an inchoate, textually-based contract right that ripens into an option upon the occurrence of the event specified in the underlying contract.”).

<sup>138</sup> See *Cannon v. Romeo Sys., Inc.*, 2025 WL 2848069, at \*22 n.171 (Del. Ch. Oct. 7, 2025) (explaining that the UCC “generally mandates that courts interpret its provisions to promote its ‘underlying purposes and policies’ including ‘simplification and clarification of the law and continued expansion of commercial practices’” (citation omitted)).

<sup>139</sup> Def.’s Opening Br. 16-19.

give the other parties thereto the right to terminate, accelerate or otherwise alter such Loan Party's rights . . . thereunder . . . .<sup>140</sup>

Zevra asserts that if Section 15.5(c) of the License Agreement restricts the Credit Agreement, then granting the security interest to the lenders was “prohibited.” In that case, the Credit Agreement's saving clause is brought into play, and the License Agreement is carved out of the pledged collateral.<sup>141</sup>

This circular argument fails because the condition for the exclusion—a *prohibition* on the grant of a security interest—does not exist. As discussed above regarding the UCC, Section 15.5(c) does not prohibit the assignment of rights or the creation of a security interest.<sup>142</sup> It establishes procedural requirements (the ROFN and ROFR) that Zevra must satisfy before such a transaction. Because the License Agreement did not prohibit the grant of a security interest, the condition for the Credit Agreement's Excluded Property exception was unmet. The License Agreement remained part of the collateral Zevra pledged.

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<sup>140</sup> Credit Agreement § 1.01 (defining “Excluded Property”) (emphasis added). In responding to Zevra, Commave also points to subsection (iii) of the definition, but the result is identical. That subsection also requires the grant to be “prohibited by the terms and provisions” of the License Agreement. *Id.*

<sup>141</sup> Def.'s Opening Brief 17.

<sup>142</sup> See *supra* Section II.B.2.b.

d. Section 15.5(d)'s "Null and Void" Provision

Finally, Zevra argues that the License Agreement is structured to prohibit its own violation. It cites Section 15.5(d), which states that "[a]ny assignment or attempted assignment by either Party in violation of the terms of this Section 15.5 shall be null, void and of no legal effect."<sup>143</sup> Zevra posits that if the Credit Agreement violated Section 15.5(c), then under Section 15.5(d), the collateral pledge would be "null, void, and of no legal effect," making it "functionally non-existent."<sup>144</sup>

Zevra's reliance on Section 15.5(d) is misplaced. Commave seeks damages for Zevra's failure to adhere to the ROFN and ROFR, not to invalidate the assignment itself under the anti-assignment provision.<sup>145</sup> Zevra cannot rely on a provision designed to protect the non-breaching party to shield itself from liability for its own procedural failures.

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Commave has established that the grant of a security interest through the Credit Agreement constituted a Payment Assignment under Section 15.5(c). Zevra

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<sup>143</sup> License Agreement § 15.5(d).

<sup>144</sup> Def.'s Opening Br. 19.

<sup>145</sup> See *supra* note 136; see also Pl.'s Answering Br. 17 (noting the issue is not that the assignment is void, but that Zevra entered a valid assignment without honoring antecedent rights).

did not comply with the mandatory procedures of Section 15.5(c), specifically the ROFN and ROFR. There is no legal bar to the enforcement of Section 15.5. Zevra is liable for breach of the License Agreement, and summary judgment is granted to Commave on Count VI.<sup>146</sup>

### **III. CONCLUSION**

Commave's motion for partial summary judgment is granted on Count I, and granted on Count VI as to liability. Because I find in favor of Commave on Count VI, Count VII is moot. Zevra's cross-motion for partial summary judgment is denied.

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<sup>146</sup> To be clear, summary judgment is granted on liability only. The amount of any damages will be determined after trial.