IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CANDOR COMPASS LLC, Plaintiff/Counterclaim Defendant, v. IDENTIVISUALS SRL and IDENTIVISUALS INC., Defendants/Counterclaim Plaintiffs.	)	C.A. No. 2024-1179-MTZ

POST-TRIAL MEMORANDUM OPINION

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ZURN, Vice Chancellor.[1]

[1] Sitting by designation under Del. Const. art. IV, § 13(2). Docket item ("D.I.") 82.

A startup hoping to commercialize its artificial intelligence-based emotion detection technology sought out a partner with more experience and access to the legal technology space. The startup was cash-strapped and its technology was far from ready for market. Still, it found a well-connected partner and mentor who saw promise. After two months of negotiations, the startup and the partner's company executed a term sheet for a license agreement.

The licensee bargained for contractual insurance against the risk of the startup's failure. Under the term sheet, the startup had to make the developing technology available to the licensee so that the licensee had something to work with should the startup fail to complete product development. The startup had to deliver to the licensee everything it needed to use the technology independently, then escrow the rest of the intellectual property. The parties also agreed that if the startup breached, the startup would transfer ownership of the licensed technology to the licensee.

The startup wanted the term sheet to be a binding agreement, so it could book revenue and tell investors it had entered into a license agreement. At the startup's urging, the parties agreed to make the term sheet a binding contract.

The startup never delivered or escrowed the technology as the contract required. It never could: unbeknownst to the licensee, the startup had stopped paying its product developers, so the developers stopped working, limited access to the product, and threatened to keep and liquidate their work. The startup concealed this from the licensee until after the term sheet was executed. For nearly a year, the licensee shuttled between the company and the developers to save the product. It could not develop the product on its own because the startup never delivered or escrowed the licensed technology, and the developers were threatening to walk away with the product. When enough was enough, the licensee declared the startup in breach of the term sheet and came to this Court seeking an order enforcing the term sheet's transfer requirement.

This post-trial opinion finds in the licensee's favor on all its claims and the startup's counterclaim. It concludes the term sheet is a valid and enforceable preliminary agreement giving rise to fully binding contractual obligations, rather than an agreement to agree. It finds the startup breached those contractual obligations, knowing what was required and why the licensee had bargained for them. And it concludes the licensee is entitled to a decree of specific performance.

I. BACKGROUND[2]

Trial took place over four days, featuring four live witnesses and over three hundred joint exhibits.[3] The following facts were stipulated to by the parties or proven by a preponderance of the evidence at trial.[4]

A. IDV Recruits David Noteware As An Advisor.

Defendant/counterclaim plaintiff iDentivisuals SRL is an Italian technology startup founded by Christian Candela in 2016.[5] Its vision is a tool by which artificial intelligence can discern and analyze human emotions.[6] By 2021, it had successfully developed a proprietary algorithm and sought to expand into the United States.[7] It incorporated a subsidiary in Delaware called iDentivisuals Inc. (together with iDentivisuals SRL, "IDV" or the "Company") and brought on Ian Wilcox first as an advisor and then chief executive officer.[8]

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[2] Citations in the form "[Last Name] Tr. —" refer to trial testimony of the referenced witness, available at D.I. 60 through D.I. 63. Citations in the form "JX —" refer to the parties' joint trial exhibits. Citations in the form "PTO —" refer to the parties' stipulated pretrial order, available at D.I. 49.

[3] D.I. 58; D.I. 66.

[4] *See generally* PTO; *Reynolds v. Reynolds*, 237 A.2d 708, 711 (Del. 1967) ("The side on which the greater weight of the evidence is found is the side on which the preponderance of the evidence exists.").

[5] PTO ¶ 2; Candela Tr. 794.

[6] Candela Tr. 794.

[7] *Id.* at 795–96; PTO ¶ 4; Wilcox Tr. 528–29.

[8] PTO ¶ 3; Candela Tr. 797–98; Wilcox Tr. 518–19.

IDV struggled to obtain funding. In early 2022, after a failed attempt at an IPO, IDV went back to the drawing board.[9] Wilcox suggested reaching out to his friend and colleague David Noteware.[10] Noteware is an entrepreneur who founded, ran, and sold a successful litigation support company called NextGen Reporting ("NextGen"), among other companies.[11] He also taught entrepreneurial finance at the University of Utah and worked in its technology transfer office, where he helped bring University innovations to market.[12] Wilcox believed Noteware's experience with NextGen could help IDV explore a potential application in the legal technology space.[13]

IDV found its initial conversations with Noteware helpful and envisioned a more formal role for him at the Company.[14] On September 19, Noteware agreed to serve as an advisor.[15] In that capacity, Noteware introduced IDV to subject matter

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[9] Candela Tr. 799–800.

[10] JX 9; Wilcox Tr. 531–32.

[11] Noteware Tr. 6, 10.

[12] *Id.* at 7–8.

[13] *See id.* at 9–10; JX 9; JX 17; Wilcox Tr. 532–33.

[14] *See* JX 17 (inviting Noteware to "join [IDV] as an advisor and board member"). Noteware did not end up joining IDV's board. PTO ¶¶ 2–3.

[15] PTO ¶ 5; JX 24 ("The focus of the contract is twofold: 1) your role as a business developer for us with the legal deposition market segment[;] 2) your role as strategic advisor[.]"); JX 28; *see also* JX 18; JX 20; JX 21; JX 22.

experts,[16] advised IDV on fundraising processes,[17] and guided IDV through the patent application process.[18]

B. IDV Hires A Development Team To Create A Minimum Viable Product.

With Noteware's help, IDV's vision crystallized into a platform to aid attorneys in assessing witness credibility during depositions.[19] To get there, IDV planned to develop the technology, turn it into a "minimum viable product" usable by early customers, and then iterate on that product until it was ready to be commercialized.[20]

IDV did not have a platform to implement its technology or the software developers to build one: its existing development team was inadequate.[21] Wilcox looked to hire a new development team to build a minimum viable product.[22]

[16] *See* JX 30 at 1; Noteware Tr. 25–27.

[17] *See* JX 76; JX 30 at 1.

[18] JX 46; Noteware Tr. 26–27.

[19] *See* JX 40; JX 41.

[20] Randall Tr. 314 ("So as part of any sort of entrepreneurial effort you'll want to develop what's called an MVP, minimum viable product . . . . [I]t's a tool that's sufficiently developed that a very early adopter . . . [can] play with the tool and give you feedback on how well it works, the idea being you take that feedback, you make constant improvements, and at some point you're able to get something good enough that you can start selling to people."); Candela Tr. 812 (defining a minimum viable product as "a software with a minimum set of features that are required for a user to actually make it work, test it, and to prove the value of the application").

[21] Wilcox Tr. 560; *see also* Noteware Tr. 78–79; Randall Tr. 314–15.

[22] PTO ¶ 6; Wilcox Tr. 560; *see also* Randall Tr. 314–15; Noteware Tr. 78–79.

Around January 2023, Wilcox reached out to Michael Jabbour about hiring his development company, Engage Consulting, LLC ("Engage").[23] IDV and Engage continued discussions through the spring.[24] Noteware was introduced to Jabbour in March,[25] but did not participate in any negotiations.[26]

IDV created an Italian subsidiary to contract with Engage called Emotize SRL, which qualified for public grants that could pay Engage.[27] In May and June, Emotize entered into virtually identical retainer agreements with Engage and its subcontractor Flatstack, LLC.[28] Both agreements stated "[t]he goal of this project is to develop an AI-based web application for emotion detection analysis."[29] They defined the "scope of work" to include "engineering services for the development of an Emotion detection application utilizing existing algorithms."[30] The project would last twenty-two weeks, and IDV would be billed biweekly.[31] Payments were due on the first day of each month after the agreements went into effect.[32] IDV gave the

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[23] Wilcox Tr. 560–61, 563; Noteware Tr. 37–38.

[24] Wilcox Tr. 560–61, 563; Noteware Tr. 37–38.

[25] *See* JX 58.

[26] Noteware Tr. 38.

[27] Candela Tr. 809–10, 814; Wilcox Tr. 562.

[28] PTO ¶ 6; JX 290; JX 350; JX 354.

[29] JX 290 at 8; JX 354 at 8.

[30] JX 290 at 8; JX 354 at 8.

[31] JX 290 at 8; JX 354 at 8.

[32] JX 290 § 3; JX 354 at 7.

developers a set of formulas; IDV's proprietary algorithm; and IDV's "core layer of technology"—i.e., the layer responsible for "processing . . . biometrics or [] nonverbal metrics."[33]

Armed with a new development team, IDV's work accelerated that summer.[34] Jabbour and his team were sophisticated, competent, and capable of delivering "uniformly high quality" work.[35] The team worked particularly hard on the project in July.[36] In September, the team led a demonstration to two potential Italian investors and "walked away with very positive feedback."[37]

C. IDV Negotiates A Term Sheet While Failing To Pay Its Development Team.

IDV was running out of cash.[38] The development team was expensive, and European fundraising efforts were unsuccessful.[39] IDV went back to the drawing board and concluded the next strategy would be to license its technology for various

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33 Candela Tr. 811–12; *see also* JX 78 (discussing the delivery of IDV's formulas to Engage); JX 97.

34 Wilcox Tr. 565.

35 Noteware Tr. 78; Randall Tr. 311.

36 Wilcox Tr. 565.

37 Wilcox Tr. 570–71; *see also* JX 91 (email from Wilcox noting his frustration at not securing financing after a successful call).

38 *See* JX 76; JX 91.

39 JX 91; *see* JX 102; Noteware Tr. 81.

vertical applications.[40] That way, IDV could show investors it had "partner[s] who could take and commercialize [IDV's technology]."[41]

Wilcox wanted Noteware to lead a legal technology vertical in the United States.[42] Specifically, he proposed that Noteware found a U.S.-based entity to commercialize IDV's deposition tool while paying royalties as a licensee.[43] The idea was originally floated to Noteware in the fall of 2022, weeks after he agreed to be IDV's advisor.[44] Noteware was hesitant: he did not want to run another company on his own and lacked confidence that IDV's technology worked.[45]

By the fall of 2023, Noteware felt better about a licensing arrangement, as the developers' work gave him more confidence in the technology, and he had identified a colleague to join him in running the new company.[46] Ross Randall was Noteware's

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[40] JX 91; Noteware Tr. 30; JX 51 at 2; Wilcox Tr. 576.

[41] Wilcox Tr. 576.

[42] *See* JX 91 (noting Wilcox's belief that "given the robust nature of the legal tech market in the US currently . . . the European investor does not have the appetite or understanding of the market opportunity . . . . In the meantime, we are working with David Noteware to consider various strategic options, including a possible pivot and focus to re-brand ourselves to target US investors"); Noteware Tr. 30.

[43] JX 42; Noteware Tr. 30, 32.

[44] JX 42; Noteware Tr. 29–32.

[45] Noteware Tr. 31–32; *see also* JX 51 (January 25, 2023 email noting that "before finalizing a[] [license] agreement, [Noteware] has asked for the following": (1) an "independent verification of the video based detection software platform," and (2) a "description of how deception is evaluated").

[46] Noteware Tr. 32.

colleague at the University of Utah's technology transfer office.[47] During his time there, Randall managed its intellectual property portfolio and analyzed early-stage technologies from patentability and business perspectives.[48] He left the technology transfer office in July 2023 to work full time with Noteware as a partner, devoting most of his time toward IDV.[49]

On August 30, Noteware sent Wilcox a draft of a term sheet for an "intellectual property license agreement" (the "Term Sheet") between IDV and Noteware's "NewCo,"[50] which would be plaintiff Candor Compass LLC.[51] As Noteware explained, "this first draft anticipated there would be a second, more extensive dispositive agreement with recitals and all that stuff."[52] The Term Sheet defined "Technology" to include:

> The source material from which object materials are compiled, including the fully commented source code and internal system documentation for the computer software, as well as all other materials, in both machine readable and hard copy form, which are used to develop or test the software, as well as all electronically readable source documentation, design documents, data models, help materials, tutorial programs and appropriate debug code.[53]

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[47] *Id.* at 8; Randall Tr. 301.

[48] Randall Tr. 300.

[49] *Id.* at 301, 304–06.

[50] JX 88; *see also* JX 79; JX 81.

[51] PTO ¶¶ 1, 14; JX 140.

[52] Noteware Tr. 35–36.

[53] JX 88 at 2.

The delivery and acceptance provision required:

> The Licensor shall provide materials sufficient to enable Licensee to test, operate, adjust, modify, and adapt the technology independently, without the need to seek technical support from [L]icensor.[54]

The Term Sheet's first draft also contained an escrow provision that read:

> Licensor shall cause any IP not explicitly provided to be held by an escrow agent at its own expense. Licensor shall cause this material to be updated not less frequently than monthly.
>
> If [L]icensee fails to either (a) cause the escrow account to be updated on the monthly basis above, (b) fails to respond to any queries or requests from Licensee, or (c) breaches this license agreement, then (1) this Agreement will be in breach, (2) Escrow Agent shall be automatically directed (per the terms of the escrow agreement) to release all escrowed material to Licensee, and (3) all Technology and escrowed material shall be automatically conveyed in fee simple to Licensee.[55]

The first draft also stated:

> This term sheet is for discussion purposes only, [and] is not intended to create legal rights or obligations. Any past or future action, inaction, or course of conduct relating to a possible transaction does not constitute a binding offer or a binding agreement and does not give rise to any obligation on the part of either party to negotiate or otherwise continue discussions with respect to a transaction.[56]

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[54] *Id.* at 4.

[55] *Id.*

[56] *Id.* at 5.

Wilcox responded around three weeks later with revisions.[57] IDV wanted a binding license agreement that allowed it to book revenue, so it could tell potential investors it had a paying licensee.[58]

IDV was in a hurry to sign a binding license agreement it could show potential investors.[59] IDV's relationship with Engage was collapsing, and IDV was about to

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[57] JX 93.

[58] *See, e.g.*, JX 116 at 1 (October 24, 2023 email from Wilcox describing the benefits of an executed agreement as a "win"); JX 118 at 5 (reflecting IDV's desire for "some way to recognize revenue/raise an invoice and show revenue from the deal"); JX 140 at 5; JX 50 (noting IDV's focus on executing an agreement); JX 107 at 5 (Term Sheet markup changing the language to reflect the agreement "create[d] legal rights and obligations" rather than being used for discussion purposes); JX 141 (November 8, 2023 email from Candela stating "[t]he Term Sheet [is] signed with Candor Compass . . . let's plan a call soon so that we can start this fundraising process"); JX 286 (July 31, 2024 email from Wilcox explaining "[w]e have a signed agreement with Candor – for use in the legal dep space – it is in force and provides us some cover"); Wilcox Tr. 662 ("That was what . . . we were focused on, was the ability to book the revenue."); *id.* at 663 ("I wanted to have something that was more than just a heads of agreement. Because I knew that if I just showed that to you as an investor, you'd go, so what?"); Noteware Tr. 55 ("[T]hey told us that their advisors told them they had to have revenue. They needed to be able to book revenue for fundraising purposes . . . . The '[o]ther [l]icense [f]ees' is the effort to create some sort of revenue line item that they could show to potential investors."); *id.* at 57 ("If you have, like up-front payments and revenue being booked and such, it can't be an agreement to agree. It has to be an agreement, otherwise you can't book it."); *id.* at 63 ("So [Wilcox] and [Candela] are asking for changes there because they want to be able to use this as an agreement that they can book revenue against and have a revenue line item on their P&L for fundraising purposes."); Randall Tr. 321–22 (explaining IDV was having trouble raising money and wanted an agreement to book revenue); *id.* at 329 ("[B]ut it's more important for them to actually book the 60k than it is to actually have it. That's really their interest here . . . it was clearly communicated that they wanted the ability to go out and say, look, we raised 60k or we have this and to book that AR on their books."); *id.* at 341–42 (testifying that IDV was negotiating the royalty provision primarily to be able to book revenue).

[59] JX 104 at 5; Noteware Tr. 57 (testifying IDV was "in a hurry and needed to be able to trumpet that they had success and had one contract signed . . . . If you have[] [] up-front

lose the development team and the platform it was building. IDV owed Engage nearly $20,000,[60] and Engage threatened to shut off access "to everything."[61] On September 19, just a couple weeks after receiving the first draft of the Term Sheet, Wilcox wrote to another IDV advisor: "I have been advised that we will be in breach of contract [with Engage] shortly, and thus we will not have access to the platform for demo purposes."[62] Neither Noteware nor Randall were included on this email.[63] They did not know IDV was in arrears and risked losing access to the platform.[64]

Noteware knew IDV wanted a binding agreement, not just a term sheet.[65] Noteware sent a markup on October 11 that struck the language indicating the Term Sheet was solely for discussion purposes and replaced it with the following

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payments and revenue being booked and such, it can't be an agreement to agree"); Randall Tr. 323–24 (testifying IDV changed the language to "create legal rights and obligations").

[60] *See* JX 80; JX 90 (September 4, 2023 email from Jabbour to Wilcox and Candela noting that "we need to consider how to address outstanding payments and funding"); JX 355 (September 19, 2023 email from Wilcox to an IDV advisor stating "I was informed by Engage/Flatstack that our engagement is 80% complete. However, we have been unable to pay our invoices to them in a timely manner"); JX 105 (October 11, 2023 email noting outstanding invoices "in the amount of $18991.31").

[61] Noteware Tr. 83–84.

[62] JX 355.

[63] *See id.*

[64] Noteware Tr. 82–83, 118, 288–89; Randall Tr. 315–16, 339, 342, 349. The only evidence that Noteware and Randall knew of the outstanding invoices to Engage, and the consequences for nonpayment, is Wilcox's trial testimony stating he consulted with Noteware about the invoices and potential fundraising options. Wilcox Tr. 574–75, 591. On this point, Noteware and Randall were vehement and quite credible. Wilcox was not credible.

[65] *See* Noteware Tr. 57.

language: "This term sheet creates legal rights and obligations. In a prompt manner, the parties will convert this term sheet into a set of final document[s] expanding the details of the agreement between the parties."[66]

That same day, Wilcox told Candela that they were "running out of time" and needed to "close the deal with David [Noteware]."[67] On October 24, Wilcox advised Candela, "[W]e simply need to execute this, signature blocks, etc., and sen[d] it . . . . [I] will tell you this is a win for the short term; let's look beyond the 'technical details' and focus on what having an agreement enables for the company longer term."[68]

IDV also suggested edits with an eye towards booking revenue. IDV inserted a royalty comprising "3% of net profits for the first nine (9) years of the agreement"; an "equity interest in the Licensee, amounting to (7)% of its total and outstanding shares in the form of common stock"; and a "one-time $75,000 royalty payment by end of June 2024."[69] Noteware countered with a royalty of "2% of net profits for the first nine (9) years of the agreement"; an "equity interest in the Licensee, amounting to (8%) of its total and outstanding shares in the form of common stock"; and a "one-time payment of $100,000 royalty after Licensee attains $2 million in net

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[66] JX 104 at 5; JX 106-N at 4; JX 107 at 5.

[67] JX 105 at 1.

[68] JX 116 at 1.

[69] JX 93 at 4.

income in a fiscal year."[70] From there, IDV focused on obtaining recognizable revenue. IDV asked if they could break the payment into installments so revenue could be recognized immediately.[71] Eventually, the parties settled on one $60,000 payment that could be invoiced on execution but was not payable until IDV earned income.[72]

As IDV pressed for a signed agreement with bookable revenue, it also ensured it understood the delivery and escrow obligations. IDV had its attorney in Italy review the draft.[73] On October 5, Wilcox asked about the term "source code" and the purpose of the escrow provision.[74] As to the source code, Noteware explained, "We'll need the source code for the entire algorithm to be escrowed and available for management should the NewCo be forced to complete development."[75] As to the escrow provision, Noteware explained, "The escrow protects the licensee from any sort of problem at the licensor level. Given the instability at the SR[L] level,

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[70] JX 106-N at 4; *see* JX 107 at 4.

[71] JX 118 at 5 ("Can we break this into payments of $20k over five years? CC wants to find some way to recognize revenue/raise an invoice and show revenue from the deal.").

[72] JX 140 at 4.

[73] JX 93; JX 95; JX 96; *see* Wilcox Tr. 646; Candela Tr. 832–33.

[74] JX 101 at 2.

[75] *Id.* at 1.

we'd need security that the code won't disappear into the ether."[76] He also explained the escrow requirement is "standard for software."[77]

On October 29, Noteware circulated another markup.[78] Wilcox sought further clarification about the escrow provision by asking, "I assume what is in escrow would be elements of our work related to the product develop[ment]? How does the escrow work in practice? Does a third party hold the information?"[79] In response, Noteware explained, "Yes the SRL would pay for a third party to hold the code and documentation of all the Technology. It's pretty common when there's a risk that the licensor is a start-up."[80] Wilcox did not push back.[81] Wilcox then forwarded the Term Sheet to Candela, stating: "This is [Noteware's] best and final from what I can tell . . . . I reiterate my position – an agreement at this point is a win."[82]

Then Engage struck. On October 31, Wilcox wrote to an IDV advisor that "the development partners have informed me [that] they have suspended work and

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[76] *Id.* at 2.

[77] Wilcox Tr. 653.

[78] *See* JX 123; JX 123-N.

[79] JX 123-N.

[80] *Id.*; *see also* Noteware Tr. 66 ("[I]f [IDV] failed and we had to get access to [the technology] to continue the development, [the escrow provision] is how you get it without them actually giving it to us up front. They put the keys to the castle in escrow, and we only get it if they fail.").

[81] Noteware Tr. 66 ("[T]hey . . . never pushed back.").

[82] JX 125 at 1.

will not allow access to a demo until full payment is received . . . . [T]he demo/MVP and access to the development team has been suspended."[83] Again, neither Noteware nor Randall knew about this issue.[84]

On November 1, Noteware circulated a final version of the Term Sheet.[85] Wilcox forwarded it to Candela the same day, asking him to "[p]lease sign and send to me now. We need to execute before David [Noteware] talks to MJ [Jabbour]."[86] IDV wanted the Term Sheet signed before Noteware and Randall found out Engage was about to lock IDV and its partners out of the platform and its underlying technology.[87] Had Noteware and Randall known, they would not have moved forward with the Term Sheet.[88]

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[83] JX 128 at 2.

[84] *See* JX 128.

[85] JX 135; *see* JX 133; JX 134.

[86] JX 135 at 1; *see* JX 134 at 1.

[87] When asked about what he meant by IDV's "need to execute before David [Noteware] talks to MJ [Jabbour]," Wilcox testified: "I wanted MJ [Jabbour] to know that Candor Compass and iDentivisuals had a signed term sheet and were joint venture partners." Wilcox Tr. 592. This explanation is not credible. It says nothing about why Wilcox did not want Noteware or Randall to speak to Jabbour. The preponderance of the credible evidence shows: Wilcox knew IDV was in arrears, he knew Engage had pulled the plug on product development and was going to lock IDV out, and he knew Noteware and Randall would have discovered all of those facts, and paused or stopped the Term Sheet, if they spoke to Jabbour first. *See* JX 355; JX 105; JX 128.

[88] *See* Randall Tr. 331 ("Had we talked to MJ [Jabbour] and found out that [IDV] didn't have possession of the technology and that we basically had to come up with half million dollars before we were in a position that we could commercialize the technology, we sure as hell wouldn't have signed this agreement.").

D. The Parties Execute The Term Sheet.

IDV got the binding agreement and booked revenue it wanted. Wilcox and Candela signed the Term Sheet for IDV on November 1, and Randall countersigned on November 7.[89] The final version states: "This term sheet creates legal rights and obligations. In a prompt manner, the parties will convert this term sheet into a set of final document[s] expanding the details of the agreement between the parties."[90]

IDV touted the Term Sheet as a binding agreement. The day after it was executed, Candela told an IDV advisor it could begin fundraising now that it had a "licensee in the US."[91] Wilcox likewise told the advisor IDV had "executed a royalty/equity agreement with David Noteware and his new co."[92] A week later, IDV stated in an investor presentation that it had "begun its go-to-market by securing a licensing agreement in the legaltech market."[93]

As for bookable revenue, the Term Sheet provides for a royalty amounting to "2% of net profits for the first nine (9) years of the agreement, declining by 1/9th per year"; an equity interest in Candor Compass amounting to "8% of its total founder shares in the form of common stock"; and "an upfront fee of $60,000" that

[89] PTO ¶ 7; JX 140 at 1, 6.

[90] JX 140 at 5.

[91] JX 141.

[92] JX 145 at 3.

[93] JX 356 at 5; *see* JX 218 at 3.

IDV can invoice "[u]pon execution of th[e] Agreement."[94] IDV immediately booked the $60,000 upfront payment as revenue under Italian accounting principles.[95]

Candor Compass had not yet been formed as of the Term Sheet's effective date. The Term Sheet notes that "[p]romptly after execution of this agreement," the parties would "inform each other of the complete names of the entities.[96] Candor Compass was formed as a Delaware limited liability company the same day.[97]

The Term Sheet sets forth a "summary of certain key terms of an intellectual property license and joint venture agreement" among IDV and Candor Compass.[98] Candor Compass received an exclusive license to use IDV's "Technology," defined to include all of IDV's "current and future intellectual property rights, including, without limitation, all patents, copyrights, trade secrets or 'know how,' and all applications and registrations for any of the foregoing . . . relating to evaluation of emotions and behavior using audio and video."[99] That includes any "subject matter claimed or enabled by any current or future patent or patent applications relevant to the technology"; the "computer software in object material form, to run the licensed

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[94] JX 140 at 4–5.

[95] *See* Candela Tr. 817–18.

[96] JX 140 at 2.

[97] PTO ¶ 14; JX 137 (certificate of formation dated November 7, 2023); JX 138; JX 335 (operating agreement); Noteware Tr. 76.

[98] JX 140 at 2.

[99] *Id.*

technology"; the "object material in machine readable form, to run the licensed technology"; and the "source material from which object materials are compiled."[100] The term of the license is "perpetual" for the life of any intellectual property rights, unless and until the license is terminated.[101]

The "Territory" for the license is "worldwide within the application's [F]ield of [U]se."[102] Its "Field of Use" is defined as "[a]ll applications with respect to the legal system, including courtrooms, depositions, and examinations related to civil, criminal and regulatory actions."[103] The Term Sheet entitles Candor Compass to "a right of first refusal on other applications in the North American market."[104]

Relevant here, the Term Sheet obligates IDV to take two actions with respect to the licensed technology. Under the "Delivery and Acceptance" provision, IDV must "provide materials sufficient to enable [Candor Compass] to test, operate, adjust, modify, and adapt the technology independently, without the need to seek technical support from [IDV]."[105] And under the "Escrow" provision, IDV must "cause any IP not explicitly provided to [Candor Compass] to be held by an escrow

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[100] *Id.*

[101] *Id.* at 4.

[102] *Id.* at 3.

[103] *Id.*

[104] *Id.*

[105] *Id.* at 4.

agent at its own expense" and "cause this material to be updated not less frequently than monthly."[106] If IDV breaches any of those obligations, "all Technology and escrowed material shall be automatically conveyed in fee simple to [Candor Compass]."[107]

E. Candor Compass Tries To Keep The Development Team At The Table.

Within the next month, Noteware and Randall found out from Jabbour that due to IDV's nonpayment,[108] Jabbour was "threatening to cut off access to everything" and proceed with asset reclamation by the end of the year.[109] It was as if the "rug [had been] pulled out from under [them]."[110]

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[106] *Id.* at 5.

[107] *Id.*

[108] *See* JX 160 at 2 (December 13, 2023 email from Jabbour to Noteware noting outstanding invoices in the amount of $407,770); JX 148 at 2 (November 15, 2023 email from Flatstack expressing "concern[] about the radio silence . . . with regards to the updates on the grant and payment for [IDV's] balance"); Noteware Tr. 83–84.

[109] Noteware Tr. 83–84; *see also* Randall Tr. 350 (testifying it became "immediately apparent . . . he was of the position that he could simply just liquidate all of the work that had been done"); JX 145 at 3 (November 12, 2023 email from Wilcox to an IDV advisor stating "We are in breach of contract with Flatstack and Engage; the development team has been disbanded and MJ will no longer formally engage with us . . . . Further, if payment delays continue into 2024, Engage and Flatstack will seek punitive damages, including withholding access to the platform."); JX 152 at 1 (December 11, 2023 email from Jabbour to Candor Compass stating "Our lawyer will send the breach and asset reclamation letter this week with a termination date of 12/31/23. At that point, we will simply be moving forward with asset resale or some other path.").

[110] Noteware Tr. 83–84.

Noteware needed Engage to finish development so that Candor Compass had something to sell.[111] So Candor Compass's first order of business was to keep Engage working.[112] That required raising money with IDV.[113] That was not an easy task. IDV kept making promises about unconventional "sources of funding" that never materialized.[114] It was not transparent about the status of those sources. IDV was sometimes "radio silen[t]" when asked for updates.[115] The developers did not trust IDV.

Against that backdrop, Candor Compass had to "step into the void."[116] It had to convince Jabbour to "turn the lights back on," so that Candor Compass could take

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[111] *Id.* at 84–85.

[112] *See* JX 143 (November 14, 2023 email from Randall to Wilcox asking to "discuss how we might go about keeping [Jabbour]'s team engaged"); Randall Tr. 342, 350.

[113] *See* JX 154 (Noteware proposing a payment plan); Randall Tr. 349 ("[W]e had to go back to step zero and start figuring out a way for MJ [Jabbour] to get paid for work that he had done on behalf of IDV."); Noteware Tr. 84.

[114] JX 215 (May 6, 2024 email from Wilcox to Noteware stating "we will have a small margin of cash to carry us forward until funds are received from Montenegro . . . . The Puglia grant money of $280k will be received after Christian pays an outstanding loan of $28k to Puglia"); JX 224 (May 23, 2024 email from Wilcox to Noteware explaining that "the Dubai world and the gold exchange is happening and RMA SWIFT communication between receiving and sending banks is live"); Wilcox Tr. 726–27; Randall Tr. 350–51; *see, e.g.*, JX 148 at 1; JX 268; JX 162 at 1; JX 202 at 1; JX 228; JX 258; JX 348.

[115] *See* JX 148.

[116] JX 152; *see* JX 151.

the lead on fundraising and "get him paid."[117] To that end, Candor Compass convinced Jabbour to grant it limited access to the platform.[118]

Over the next few months, Candor Compass worked diligently to refine the platform and develop pitch materials.[119] It spent time learning how the platform worked, devised a tool to measure the platform's accuracy, and hired a team to help build that tool.[120] It built a database to train the underlying algorithms.[121] It also continued to advise IDV on the patent process,[122] and used its own money when IDV could not pay its patent attorneys.[123] Candor Compass kept IDV in the loop every step of the way.[124]

Meanwhile, Candor Compass failed to document any assignment of equity to IDV.[125] The Term Sheet states, "[Candor Compass] shall assign to [IDV] an equity

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[117] Randall Tr. 352–53.

[118] *Id.*

[119] *See* JX 170; JX 171; JX 173; JX 179; JX 182; JX 186; JX 195.

[120] *See* Randall Tr. 354–55; Noteware Tr. 93.

[121] Randall Tr. 354–55, 496–97; JX 186; JX 206.

[122] *See* JX 214; JX 217; JX 220; Randall Tr. 361–65.

[123] JX 223; JX 217; JX 259; Noteware Tr. 91–92 ("Getting [Candela] to pay for things was really quite challenging, so sometimes it was easier just to pay for it. And the lawyers have to get paid or they'll stop working, and we had to have them get paid.").

[124] *See* JX 182; JX 186; JX 190; Randall Tr. 356 (noting Candor Compass's desire to "keep iDentivisuals in the loop, show them that we were making progress on deploying the technology, explaining some of the challenges that we were focusing on").

[125] *See* JX 180; JX 334; JX 335 Sched. 1.

interest in [Candor Compass], amounting to 8% of its total founder shares in the form of common stock at the time of the grant."[126] Noteware and Randall thought the assignment had happened when the Term Sheet was signed.[127] It did not. To assign equity, Candor Compass had to receive manager approval and periodically update its ownership schedule to reflect changes.[128] The operating agreement also provided that an issued "Share Certificate" was the "indicia of ownership of [s]hares."[129] But Candor Compass never issued a certificate of ownership, and failed to list IDV on its ownership schedule or its capitalization table.[130] IDV was not listed on the capitalization table until February 10, 2025.[131]

F. The Parties Explore New Use Cases, And Attempt To Execute An Amended And Restated License Agreement.

Candor Compass's work revealed potential to expand IDV's technology into new use cases.[132] That had been IDV's strategy from the get-go: to license its

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[126] JX 140 at 5.

[127] Noteware Tr. 205 ("[W]hen the [Term Sheet] was signed, they owned it. It's not like you have stock certificates."); Randall Tr. 348–49 ("[I]n my view, the moment we signed th[e] [Term Sheet], that transition was effective. The assignment was effective.").

[128] JX 335 §§ 7(b), 7(f) (explaining that "[t]he number of Shares and Percentage Interest of each Member shall be as set forth in Schedule 1 hereto"); *id.* § 13(c).

[129] *Id.* § 1 (defining "Share Certificate" as "the certificate or other indicia of ownership of Shares evidencing a Member's ownership thereof").

[130] JX 180 at 1; JX 334; JX 335 Sched. 1; Candela Tr. 818–19; Wilcox Tr. 590.

[131] JX 341 (Candor Compass capitalization table dated January 30, 2024 but edited on February 10, 2025); *see* Noteware Tr. 233.

[132] *See* Noteware Tr. 94 ("[I]n the process of building the measurement tool we figured out that, oh, my gosh, this is a second application of the technology. We can use it in the legal

technology across different verticals, with legal technology being just one of those verticals.[133] In the spring of 2024, IDV had been exploring a partnership with VIQ Solutions, Inc. ("VIQ") to evaluate the credibility of insurance claims.[134] IDV asked Candor Compass to assist with that effort, including by demonstrating the platform for VIQ.[135]

That demonstration was not possible for two reasons. First, in June, Engage terminated its contract with IDV.[136] The termination notice stated IDV owed Engage and Flatstack $425,577.43, and that they were going to "proceed with contract cancellation and asset recall."[137] Engage cut off access to the platform, so neither Candor Compass nor IDV could demonstrate it.[138]

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space, but we can also use it for a fintech application."); JX 221 (May 20, 2024 email from Noteware to Randall and Wilcox discussing the potential for IDV's technology to be used in "the finance industry").

[133] Noteware Tr. 30.

[134] *See* JX 187; JX 203; Randall Tr. 367 (explaining that VIQ's focus was on "working with large insurance companies to evaluate the candor of the statements made by claimants when they called in with an insurance claim"); Wilcox Tr. 720–22.

[135] Noteware Tr. 97–98 ("At some point, IDV asked me and Candor Compass and Ross [Randall] to start chatting with VIQ about whether we could collaborate with them because they wanted to move into some new areas and wanted to talk about it with us."); Randall Tr. 367–69; JX 231 (discussing a meeting between Noteware, Wilcox, and representatives from VIQ in June 2024); JX 263.

[136] JX 249.

[137] *Id.*

[138] *See* JX 264 at 1 (noting the "web interface is down as of some weeks ago, we certainly can't demo anything"); *id.* (noting "[w]e won't have access to it until we resolve the payment"); Noteware Tr. 99 ("MJ [Jabbour] cut off access to the tools, so we couldn't

Second, even assuming Candor Compass had access to the platform, it could not move forward with VIQ: an insurance-based application fell outside the scope of the Term Sheet's field of use.[139] The Term Sheet only permitted Candor Compass to license IDV's technology for use in "applications with respect to the legal system."[140]

Candor Compass was in a bind. It had spent nearly a year trying to turn IDV's technology into something marketable—for itself and for IDV—only to lose access to the platform because of IDV's nonpayment. By then, Noteware and Randall had internally discussed the reality that IDV had breached the Term Sheet's escrow provision months earlier.[141] But Candor Compass still believed it could help IDV and Engage reach a "détente,"[142] and hoped to push forward with fundraising and product development with IDV and Engage.[143]

In late June 2024, Noteware and Randall began workshopping an amended license agreement (the "Amended and Restated License Agreement") to expand the

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provide a demo . . . . We didn't have independent capability to operate it. If we did, we would have just done the demo ourselves.").

[139] *See* Noteware Tr. 96; Randall Tr. 368.

[140] JX 140 at 3.

[141] *See* JX 234 (June 11, 2024 email stating "IDV has not put the Technology in escrow, and it's therefore in breach. There's no grace period. As such, we can declare the technology in fee simple when we want to do so").

[142] Randall Tr. 371.

[143] *Id.* at 375–76 ("So in my mind, Plan A was still [to] work with IDV.").

field of use, and create a more "cosmetically pleasing" document to show investors.[144] Otherwise, the Amended and Restated License Agreement was meant "only to ratify the terms of the previous agreement."[145] Noteware and Randall believed the Amended and Restated License Agreement was beneficial and necessary: it would create more opportunities for fundraising and allow Candor Compass "to service VIQ like [IDV] wanted."[146]

Noteware sent IDV the Amended and Restated License Agreement on July 1.[147] The license covered two areas: "Testimonial Evidence" and "Business Intelligence."[148] Noteware made clear the agreement was intended to support Candor Compass's work with VIQ and its expansion into other verticals.[149]

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[144] *Id.* at 378; JX 244; *see also* Noteware Tr. 260 (confirming that "the goal" of the Amended and Restated License Agreement "was to expand the field of use").

[145] JX 245 at 2.

[146] Noteware Tr. 106; *see also* Candela Tr. 828 (explaining that with VIQ, "[t]he pie gets bigger").

[147] JX 255.

[148] *Id.* at 3. The "Testimonial Evidence" field of use would include "any use for purposes related to the collection, analysis, and verification of testimonial evidence in any setting where such evidence is pertinent; including any statements made by individuals to recount facts, events, personal observations, perceptions, experiences, or knowledge." *Id.* The "Business Intelligence" field of use would include "any use for purposes involving gathering and analyzing statements and/or data related to the performance, competitive position and risk profiles of business entities. *Id.* at 4.

[149] JX 255 at 1 ("Given that Candor Compass has been expanding into insurance-related applications with VIQ and fintech-related issues with earnings calls work, we need to expand the Field of Use in the license agreement.").

On July 2, Engage sent IDV a letter demanding immediate payment of all outstanding invoice amounts.[150] The letter warned that in the absence of payment, Engage intended "to monetize its Work Product in any manner it deems fit."[151] Throughout July, Candor Compass attempted to salvage the relationship. It offered to do an accounting of the amounts owed and navigate "a final agreement [with Engage] resolving the payment and ownership of the IP."[152]

On July 26, Candor Compass nudged IDV to execute the Amended and Restated License Agreement by offering to waive certain reimbursements.[153] IDV did not respond until July 30.[154] Among other things, it asked for higher royalties and the ability to book another invoice.[155]

The next day, Wilcox warned Candela that IDV was running on borrowed time.[156] He reminded Candela that IDV had "a signed agreement with Candor [Compass]—for use in legal dep space—it is in force and provides us some cover unless [it] gets a termination notice from Candor [Compass]—which is possible."[157]

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[150] JX 257.

[151] *Id.*

[152] JX 270.

[153] JX 273.

[154] JX 276.

[155] *Id.*; *see also* JX 283 (IDV's markup).

[156] *See* JX 286.

[157] *Id.*

Wilcox also emphasized that the "VIQ partnership . . . will be suspended because we have not granted Candor [Compass] the expansion in scope."[158]

Still, IDV pressed for more consideration. It followed up on August 2, stating that it "expect[s] changes to [its] financial terms as consideration for the broadening scope."[159] This frustrated Candor Compass. It felt IDV was already "getting something in return" because an expanded field of use would generate more royalties and more equity value.[160] And it believed IDV was attempting to materially renegotiate the Term Sheet.[161]

G. Candor Compass Declares Breach.

Candor Compass had had enough. On August 21, Candor Compass sent IDV a notice of breach of the Term Sheet—specifically, its escrow and delivery provisions.[162] The notice explained that if IDV did not cure its breach within five days, it would be required to convey its technology to Candor Compass in fee

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[158] *Id.*

[159] JX 291 at 2; *see also* Candela Tr. 824 ("I tried to seek . . . consideration . . . .").

[160] Randall Tr. 381.

[161] *Id.*; *see* Noteware Tr. 109–10.

[162] PTO ¶ 16; JX 303 at 2–3.

simple.[163] Attached to the notice was a check in the amount of $1.00 to repurchase IDV's equity in Candor Compass.[164] IDV did not respond.

On August 27, Candor Compass told IDV it would be exercising its remedies, including assuming ownership of IDV's technology.[165] IDV responded with two letters.[166] Both purported to void the Term Sheet on the grounds of duress and unconscionability.[167] Neither argued that IDV had in fact complied with the Term Sheet or that the Term Sheet was a nonbinding agreement to agree.

Wilcox resigned from his position as IDV's CEO on August 30.[168] Noteware resigned from his position as IDV's advisor on September 26.[169]

H. Litigation Ensues.

Candor Compass initiated this action on November 19, 2024, asserting three counts.[170] Count I is a claim for breach of the Term Sheet—specifically the delivery and escrow provisions. Count II seeks specific performance of the Term Sheet as a

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[163] JX 303 at 3 ("If IDV fails to cure these breaches . . . , Candor Compass will assume ownership of the Technology, including patent family PCT/IB2021/062517, as provided in the agreement.").

[164] PTO ¶ 17; JX 303 at 3–4.

[165] JX 306.

[166] *See* JX 311; JX 313.

[167] JX 311 at 2; JX 313 at 2–3.

[168] PTO ¶ 3; JX 314.

[169] JX 317.

[170] D.I. 1 [hereinafter "Compl."].

remedy for the breach. Count III seeks a declaration that Candor Compass, not IDV, "is the rightful owner of the Technology."[171]

The parties proceeded through discovery and pretrial briefing. In the midst of pretrial briefing, IDV moved to amend its answer and did so with leave on November 6.[172] In that amended answer, IDV argued for the first time that the Term Sheet was nonbinding.[173] That was the first time IDV expressed to Candor Compass that the Term Sheet was an agreement to agree.[174]

IDV's amended answer also raised numerous affirmative defenses.[175] Among them, IDV contends Candor Compass's failure to properly assign equity has two consequences: (1) it constitutes a prior material breach excusing IDV's performance, and (2) it bars Candor Compass's claims under the doctrine of unclean hands.[176] IDV also presses two counterclaims alleging breach of fiduciary duty and, assuming

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[171] Compl. ¶ 44.

[172] D.I. 33; D.I. 48; D.I. 51 [hereinafter "Am. Ans."]; *see* D.I. 37; D.I. 39.

[173] *See* D.I. 11; D.I. 33; D.I. 48; Am. Ans.

[174] *See* JX 311; JX 313.

[175] The Amended Answer raised twelve affirmative defenses. Am. Ans. at 27–31. IDV dropped seven of them in its post-trial briefing. D.I. 70 at 79 n.4 [hereinafter "IDV Opening Br."] The remaining five are as follows: (i) the Term Sheet is unenforceable for lack of essential terms; (ii) failure to mitigate; (iii) breach of the implied covenant of good faith and fair dealing; (iv) prior material breach; and (v) unclean hands. *Id.*

[176] Am. Ans. at 29–30.

the Term Sheet is an agreement to agree, breach of the Term Sheet's obligation to negotiate a final agreement in good faith.[177]

The matter was tried over four days in November and December 2025.[178] The trial record includes over three hundred joint exhibits and live testimony from four witnesses.[179]

Candor Compass responded to the amended answer and counterclaims on January 12, 2026.[180] The parties completed post-trial briefing by April 16,[181] and I held post-trial oral argument on May 1.[182]

II. ANALYSIS

The parties have the burden of proving their respective claims by a preponderance of the evidence. "Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes

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[177] Am. Ans. ¶¶ 95–110. IDV brought, then dropped, a claim for fraud in the inducement. Am. Ans. ¶¶ 88–94; IDV Opening Br. 100 n.6.

[178] D.I. 58; D.I. 66.

[179] D.I. 58; D.I. 66.

[180] D.I. 67.

[181] D.I. 68 [hereinafter "Candor Compass Opening Br."]; IDV Opening Br.; D.I. 72 [hereinafter "Candor Compass Reply Br."]; D.I. 74.

[182] D.I. 78; D.I. 79.

you believe that something is more likely true than not."[183] And "[i]t is well settled that the trier of fact is the sole judge of the credibility of witnesses and the weight to be accorded their testimony and is responsible for resolving conflicts in the evidence."[184]

A. Candor Compass Has Proven Its Breach Of Contract Claim.

The elements of a claim for breach of contract are familiar. A plaintiff must prove "(i) a contractual obligation, (ii) a breach of that obligation by the defendant, and (iii) a causally related injury that warrants a remedy, such as damages or in an appropriate case, specific performance."[185]

Candor Compass has proven each element by a preponderance of the evidence. The Term Sheet was more than an agreement to agree: it was a binding preliminary agreement with binding contractual obligations. Those obligations required IDV to deliver and escrow the licensed technology.[186] IDV breached those obligations. None of its proffered arguments or defenses have merit.

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[183] *Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *13 (Del. Ch. Feb. 18, 2020) (quoting *Del. Exp. Shuttle, Inc. v. Older*, 2002 WL 31458243, at *17 (Del. Ch. Oct. 23, 2002)).

[184] *Alabama By-Prods. Corp. v. Neal*, 588 A.2d 255, 259 (Del. 1991) (quoting *Shively v. Klein*, 551 A.2d 41, 45 (Del. 1988)); *see also Gatz Props., LLC v. Auriga Cap. Corp.*, 59 A.3d 1206, 1221 (Del. 2012) ("The law requires the trial judge to weigh the evidence, including the credibility of live witness testimony.").

[185] *AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC*, 2020 WL 7024929, at *47 (Del. Ch. Nov. 30, 2020), *aff'd*, 268 A.3d 198 (Del. 2021).

[186] JX 140 at 4–5.

1. The Term Sheet Is A Type I Preliminary Agreement.

IDV and Candor Compass agree the Term Sheet is, in some form, a binding document with binding obligations, with some room for additional work.[187] IDV contends it was a binding agreement to agree that only obligated the parties to negotiate a final contract in good faith.[188] Candor Compass argues it was a preliminary agreement to binding terms, including the escrow and delivery provisions.[189]

"Delaware law permits parties to agree to make future contracts."[190] Traditionally, agreements to agree were unenforceable if they suffered from "an absence or indefiniteness of material terms."[191] But in *SIGA Technologies, Inc. v. PharmAthene, Inc.*, the Delaware Supreme Court recognized two types of binding and enforceable preliminary agreements.[192] Type I agreements are fully binding and reflect a consensus "'on all the points that require negotiation (including whether to

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[187] *See* Candela Tr. 838 ("Q. So you considered it like a binding agreement; correct? A. Yes."); Noteware Tr. 75–76 ("It was a binding agreement. Both of us started acting upon the fact that it was a binding agreement."); Randall Tr. 343 ("[B]oth of us wanted a binding license agreement so that we could go out and raise money."); Wilcox Tr. 662–63 ("[B]oth parties are saying . . . it makes sense to make it binding.").

[188] IDV Opening Br. 41–59.

[189] Candor Compass Opening Br. 35–37; Candor Compass Reply Br. 42–57.

[190] *Straine DM Hldgs. LLC v. Breault*, 2025 WL 275408, at *4 (Del. Ch. Jan. 22, 2025) (citing *Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, 273 A.3d 752, 761 (Del. 2022)).

[191] *Cox Commc'ns*, 273 A.3d at 761 (citing *Hindes v. Wilm. Poetry Soc.*, 138 A.2d 501, 503 (Del. Ch. 1958)).

[192] *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330 (Del. 2013).

be bound) but agree to memorialize their agreement in a more formal document.'"[193] It is "preliminary . . . only in the sense that the parties desire a more elaborate formalization of the agreement."[194] Thus, the parties to a Type I agreement are "fully bound to carry out the terms of the agreement even if the formal instrument is never executed."[195] In other words, a party "may demand performance" of the "ultimate contractual objective."[196]

On the other hand, Type II agreements are "binding only to a certain degree."[197] They reflect a consensus "on certain major terms, but leave other terms open for future negotiation."[198] These agreements "do[] not commit the parties to their ultimate contractual objective but rather to the obligation to negotiate the open issues in good faith."[199] Put differently, Type II agreements are "not fully binding on the open terms yet to be negotiated; but the parties are bound to negotiate those

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[193] *SIGA*, 67 A.3d at 349 n.82 (quoting *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 548 (2d Cir. 1998)); *see Cox Commc'ns*, 273 A.3d at 761 (citing *SIGA*, 67 A.3d at 349).

[194] *Teachers Ins. & Annuity Ass'n v. Tribune Co.*, 670 F. Supp. 491, 498 (S.D.N.Y. 1987).

[195] *Adjustrite*, 145 F.3d at 548.

[196] *See id.* at 547–48.

[197] *Vacold LLC v. Cerami*, 545 F.3d 114, 124 (2d Cir. 2008) (internal quotation marks omitted) (quoting *Adjustrite*, 145 F.3d at 548).

[198] *SIGA*, 67 A.3d at 349 (quoting *Adjustrite*, 145 F.3d at 548).

[199] *SIGA*, 67 A.3d at 349 (quoting *Teachers Ins.*, 670 F. Supp. at 498).

open terms in good faith."[200] Thus, a party to a Type II agreement generally "has no right to demand performance" of the ultimate contractual objective.[201]

In determining which type of agreement the parties intended, the Court examines the "factual setting in which the document . . . was negotiated and executed."[202] That exercise is an objective one and requires looking to the parties' "expressed words and deeds as manifested at the time rather than by their after-the-fact professed subjective intent."[203] The best place to start is within the four corners

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[200] *In re Est. of Landon*, 2023 WL 5533132, at *3 (Del. Ch. Aug. 28, 2023) (citing *SIGA*, 67 A.3d at 349).

[201] *Learning Annex Hldgs., LLC v. Whitney Educ. Gp., Inc.*, 765 F. Supp. 2d 403, 410–11 (S.D.N.Y. 2011) (citing *Adjustrite*, 145 F.3d at 547–48).

[202] *Leeds v. First Allied Conn. Corp.*, 521 A.2d 1095, 1097 (Del. Ch. 1986).

[203] *Black Horse Cap., LP v. Xstelos Hldgs., Inc.*, 2014 WL 5025926, at *12 (Del. Ch. Sept. 30, 2024) (quoting *Debbs v. Berman*, 1986 WL 1243, at *7 (Del. Ch. Jan. 29, 1986)); *see also id.* ("Under Delaware law, 'overt manifestations of assent—not subjective intent—controls the formation of a contract.'" (quoting *Indus. Am., Inc. v. Fulton Indus., Inc.*, 285 A.2d 412, 415 (Del. 1971))).

of the document.[204] But the Court may also consider "the course and substance of negotiations"[205] and "a reneging party's post-signing conduct."[206]

The Term Sheet reflects an intent to be bound to the parties' "ultimate contractual objective": licensing IDV's technology to Candor Compass.[207] That intent is clear on the face of the Term Sheet. The Term Sheet explicitly states it "creates legal rights and obligations."[208] It does not use conditional language to

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[204] *See Eagle Force Hldgs., LLC v. Campbell*, 187 A.3d 1209, 1230 (Del. 2018) (explaining that the "signed writing . . . generally offers the most powerful and persuasive evidence of the parties' intent to be bound" (citations omitted)); *see also, e.g.*, *Cox Commc'ns*, 273 A.3d at 760 (looking to the contract's "plain contractual text" and concluding that, "[b]ecause it leaves material terms open to future negotiations, Section 9(e) is a paradigmatic Type II agreement of the kind [the Delaware Supreme Court] recognized in [*SIGA*]" (citing *SIGA*, 67 A.3d at 349)); *Greentech Consultancy Co., WLL v. Hilco IP Servs., LLC*, 2022 WL 1499828, at *13 (Del. Super. May 11, 2022) (looking to the "language" of a term sheet and concluding it "demonstrates the parties 'agree[d] on certain major terms, but le[ft] other terms for further negotiation'" (quoting *SIGA*, 67 A.3d at 349)); *Brown v. Cara*, 420 F.3d 148, 154 (2d Cir. 2005) (considering whether "the language of the contract discloses an intention by the parties to be bound by the ultimate objective" (citing *Adjustrite*, 145 F.3d at 549)).

[205] *Leeds*, 521 A.2d at 1102.

[206] *Restanca, LLC v. House of Lithium, Ltd.*, 2023 WL 4306074, at *21 (Del. Ch. June 30, 2023); *see also Sarissa Cap. Domestic Fund LP v. Innoviva, Inc.*, 2017 WL 6209597, at *24 n.264 (Del. Ch. Dec. 8, 2017) ("'The parties' actions following the deal are also informative' in determining whether they mutually assented to be bound." (quoting *Trexler v. Billingsley*, 2017 WL 2665059, at *4 (Del. June 21, 2017) (TABLE))); Restatement (Second) of Contracts § 202 cmt. g (A.L.I. 1981) ("The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning.").

[207] *Cox Commc'ns*, 273 A.3d at 761 (internal quotation marks omitted) (quoting *SIGA*, 67 A.3d at 349).

[208] JX 140 at 5.

describe those rights and obligations,[209] or "decidedly noncommittal language suggesting, at most, a promise to work together."[210] Instead, it sets forth the essential terms of the parties' licensing arrangement, which the parties "[a]greed and accepted as of" November 1, 2023.[211] The parties also scrivened the provision stating, "This term sheet creates rights and obligations."[212]

Nothing in the Term Sheet indicates any of those terms were "open for further negotiation."[213] In *Cox Communications, Inc. v. T-Mobile US, Inc.*, the Delaware Supreme Court found a contractual provision to constitute a Type II preliminary agreement where it "left a number of terms open, such as price."[214] Its "plain terms" contemplated a "definitive [] agreement . . . on terms to be mutually agreed upon between the parties."[215] In *Greentech Consultancy Co., WLL v. Hilco IP Services, LLC*, the Superior Court found a term sheet constituted a Type II preliminary agreement where it expressly conditioned closing on the "negotiation . . . of the

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[209] *See, e.g.*, *Est. of Landon*, 2023 WL 5533132, at *3; *Greentech Consultancy*, 2022 WL 1499828, at *12–13.

[210] *Vacold*, 545 F.3d at 125 (internal quotation marks omitted) (quoting *Brown*, 420 F.3d at 154).

[211] JX 140 at 5.

[212] *Id.*

[213] *SIGA*, 67 A.3d at 349 (quoting *Adjustrite*, 145 F.3d at 548).

[214] *Cox Commc'ns*, 273 A.3d at 761; *see also Straine*, 2025 WL 275408, at *5 (finding an oral agreement to constitute a Type II preliminary agreement where "material compensation terms remained undefined").

[215] *Cox Commc'ns*, 273 A.3d at 761.

Transaction Documents."[216] The Superior Court observed "several significant terms of those Transaction Documents . . . remained unresolved."[217] Those circumstances are not present here.

IDV seizes on the Term Sheet's final sentence, which directs the parties to promptly "convert [the Term Sheet] into a set of final document[s] expanding the details of the agreement between the parties."[218] But that language is consistent with a Type I agreement.[219] Type I preliminary agreements, by definition, contemplate "a more formal document" in the future.[220] The plain text of the Term Sheet, along

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[216] *Greentech Consultancy*, 2022 WL 1499828, at *13; *see also Est. of Landon*, 2023 WL 5533132, at *3 ("The 2018 Settlement Agreement conditions Martha's conveyance of her lifetime interest on finalization of the parties' agreement. Paragraph 4 provides, 'As of the date this Agreement is finalized, Martha will convey her lifetime interest in the parcel of property . . . .'").

[217] *Greentech Consultancy*, 2022 WL 1499828, at *13.

[218] IDV Opening Br. 55 (quoting JX 140 at 6).

[219] *See Sawabeh Info. Servs. Co. v. Brody*, 832 F. Supp. 2d 280, 307 (S.D.N.Y. 2011) ("[I]t is well-settled that 'the mere fact that the parties contemplate memorializing their agreement in a more formal document does not prevent their informal agreement from taking effect prior to that event.'" (quoting *V'Soske v. Barwick*, 404 F.2d 495, 499 (2d Cir. 1968))).

[220] *SIGA*, 67 A.3d at 349 n.82 ("A Type I agreement 'is a fully binding preliminary agreement, which is created when the parties agree on all the points that require negotiation (including whether to be bound) but agree to memorialize their agreement in a more formal document.'" (quoting *Adjustrite*, 145 F.3d at 548)).

with the parties' signatures,[221] reflects a mutual intent to commit to its substantive terms.

The parties' pre- and post-signing conduct supports this conclusion. The first draft of the Term Sheet expressly disclaimed any binding obligations.[222] It stated the Term Sheet "is for discussion purposes only, [and] is not intended to create legal rights or obligations" and that no action or conduct relating to the transaction would "constitute a binding agreement."[223] The parties deleted all of that language during negotiations.[224]

IDV never pushed back on that change, though it asked about and resisted others.[225] Indeed, IDV wanted the Term Sheet to be a binding Type I agreement.[226]

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[221] *See Eagle Force*, 187 A.3d at 1230 ("[W]here the putative contract is in the form of a signed writing, that document generally offers the most powerful and persuasive evidence of the parties' intent to be bound.").

[222] *See* JX 88 at 5.

[223] *Id.*

[224] *See* JX 107 at 5. Wilcox testified he did not push back on this change because he is "not an attorney." Wilcox Tr. 660–61. That testimony carries little weight, given he freely opined on, asked questions about, and proposed revisions on other provisions.

[225] *See* JX 93 (proposing changes related to consideration); JX 101 (asking about the source code, the minimum revenue requirements for Candor Compass to maintain the license, assignments, successors, and cross-licensing); JX 118 (asking about an upfront fee, the escrow requirement, and the reversion provision).

[226] Wilcox Tr. 663 ("I wanted to have something that was more than just a heads of agreement. Because I knew that if I just showed that to you as an investor, you'd go, so what?"); *see also* Noteware Tr. 57 ("[A]s a group, we decided to convert this from a nonbinding term sheet into a binding license agreement . . . [i]n part because they were in a hurry and needed to be able to trumpet that they had success and had one contract signed.").

It wanted to finalize a contract to show investors.[227] It pushed for a provision that would allow IDV to book an invoice and recognize near-term revenue immediately.[228] IDV knew it could only do so with a binding contract.[229] IDV successfully bargained for an upfront fee, and recognized it as revenue on its financials after signing the Term Sheet.[230]

IDV also told anyone who would listen that the Term Sheet was a binding agreement. It described Candor Compass as its "licensee in the US"[231] and the Term Sheet as a "licensing agreement"[232] or a "royalty/equity agreement."[233]

Nobody indicated that the Term Sheet was simply an agreement to agree until just before trial.[234] IDV failed to include this assertion in their letters to Candor

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[227] *See* Wilcox Tr. 663; Noteware Tr. 57.

[228] JX 118 at 5.

[229] Wilcox Tr. 697–98.

[230] Candela Tr. 817–18.

[231] JX 141.

[232] JX 356 at 5; JX 218 at 3.

[233] JX 145 at 3; *see also* JX 286 (describing the Term Sheet as a "signed agreement with Candor [Compass] – for use in legal dep space – [that] is in force").

[234] The only evidence supporting IDV's theory is self-serving trial testimony that I reject as a noncredible litigation position coached by counsel. *See, e.g.*, Wilcox Tr. 585 ("[M]y assumption going into this was . . . a binding agreement to agree."); *id.* at 735–36 (testifying about an alleged phone call in which Wilcox said "I thought we were working towards finalizing an agreement"); Candela Tr. 819–20 ("I expected to enter the fundraising process and to get some funding . . . . And eventually, when we were ready, also enter a more definitive agreement.").

Compass or in filings prior to their amended answer.[235] Instead, IDV asked to amend at the eleventh hour to argue the Term Sheet was never a binding agreement.[236]

At trial, Wilcox struggled to explain how the Term Sheet was solely an agreement to agree and testified it was his "assumption" that Candor Compass knew that.[237] He more credibly testified that he believed the Term Sheet imposed an enforceable obligation on Candor Compass to pay a $60,000 fee if the company was sold.[238]

Finally, the Term Sheet's provisions are sufficiently definite to determine breach and award a remedy.[239] "For a contract to be unenforceable for indefiniteness, its material terms must be so vague that a Court cannot ascertain the parties' intent or fashion a remedy for a breach."[240] "Whether terms are sufficiently definite is a question of contract formation, not interpretation. The issue is not

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[235] *See* JX 311; JX 313; D.I. 11; D.I. 33; Am. Ans.

[236] *See* D.I. 33; Am. Ans.

[237] Wilcox Tr. 585 ("[M]y assumption going into this was . . . a binding agreement to agree.").

[238] *Id.* at 700; *see* JX 140 at 5 (providing that the $60,000 upfront fee is due "upon the earlier of (i) the sale of [Candor Compass] or (ii) when [Candor Compass] earns $2 million in net income in a fiscal year").

[239] *See Eagle Force*, 187 A.3d at 1232 ("[T]erms are sufficiently definite if they 'provide a basis for determining the existence of a breach and for giving an appropriate remedy.'" (quoting Restatement (Second) of Contracts § 33(2) (A.L.I. 1981))).

[240] *Barroso v. Vasallo TV Gp. LLC*, 2025 WL 2887262, at *7 (Del. Ch. Oct. 10, 2025) (citations omitted).

whether any terms are ambiguous."[241] "If the parties have concluded a transaction in which it appears that they intend to make a contract, the court should not frustrate their intention if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left."[242]

IDV contends the delivery and escrow provisions are indefinite. While both provisions suffer from inartful drafting, I do not find either "so vague" as to render the Term Sheet unenforceable.[243]

As to the delivery provision, IDV argues there is no definition of "materials"; no method of delivery specified; and no guidance on what it means to "enable Licensee to test, operate, adjust, modify, and adapt the technology independently."[244] The delivery provision offers a functional definition of "materials."[245] The Term Sheet grants a license covering "[a]ll [of IDV's] current and future intellectual

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[241] *Global Cap. P'rs LLC v. Green Sapphire Hldgs., Inc.*, 355 A.3d 120, 168 (Del. Ch. 2026) (citing *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233–34 (Del. 1997)); *see also Eagle Indus.*, 702 A.2d at 1233–34 ("The reality is that the contractual language defining rights and obligations of the parties is sometimes ambiguous. It is a court's duty to preserve to the extent feasible the expectations that form the basis of a contractual relationship. When, as in the instant case, the meaning and application of contract terms are uncertain, a court fulfills this duty by considering extrinsic evidence.").

[242] 1 Arthur L. Corbin et al., *Corbin on Contracts* § 4.1 (1993).

[243] *See Barroso*, 2025 WL 2887262, at *7.

[244] IDV Opening Br. 45–47.

[245] JX 140 at 4.

property rights."[246] The delivery provision required IDV to "provide" whatever was required, including the underlying code, to exercise the license by running the licensed technology "independently."[247] To "provide" means to "supply or make available."[248] To run the licensed technology "independently" means to run it "without dependence on another."[249] IDV had to give Candor Compass what it needed to work with the Technology without IDV, Engage, or anyone else. And IDV could deliver those materials in any way that fulfilled that requirement: the absence of a specific delivery method does not render the provision indefinite.[250]

IDV argues the Term Sheet does not specify what "IP" must be escrowed.[251] The escrow provision required IDV to escrow any "IP not explicitly provided" to Candor Compass and to "cause this material to be updated not less frequently than

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[246] *Id.* at 2–3.

[247] *Id.* at 4; Randall Tr. 338; *see El Paso Nat. Gas Co. v. Amoco Prod. Co.*, 1994 WL 148263, at *10 (Del. Ch. Mar. 29, 1994) ("It is a basic principle that agreements, when they are open to interpretation, should be interpreted in a manner consistent with the overall purpose they were intended to fulfill." (citation omitted)).

[248] *Provide*, Merriam-Webster, https://www.merriam-webster.com/dictionary/provide (last visited Sept. 1, 2026).

[249] *Independently*, Merriam-Webster, https://www.merriam-webster.com/dictionary/independently (last visited Sept. 1, 2026).

[250] *See Global Cap. P'rs*, 355 A.3d at 168 ("If the parties have concluded a transaction in which it appears that they intend to make a contract, the court should not frustrate their intention if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left." (quoting 1 Arthur L. Corbin et al., *Corbin on Contracts* § 4.1 (1993))).

[251] IDV Opening Br. 50–53.

monthly."[252] If IDV failed to perform, all "Technology" and "escrowed material" would automatically be conveyed to Candor Compass.[253] IDV contends "IP" is undefined and that there is some undefined amount of daylight between "IP" and "Technology."

The provisions are sufficiently definite. The escrow provision builds on the delivery provision's functional definition. IDV was required to deliver whatever Candor Compass needed to run the licensed technology, and escrow whatever intellectual property it did not deliver.[254]

The record shows IDV understood this. While negotiating the Term Sheet, Wilcox specifically asked Noteware to confirm whether "what is in escrow would be elements of our work related to the product develop[ment]?"[255] Noteware confirmed: "Yes, the SRL would pay for a third party to hold the code and documentation of all the Technology."[256] Wilcox did not ask for clarification.[257] Wilcox testified that he "understood and acknowledged" Noteware's explanation.[258]

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[252] JX 140 at 5.

[253] *Id.*

[254] *Id.* at 4–5.

[255] JX 118 at 5.

[256] JX 124 at 5.

[257] Wilcox Tr. 679–81.

[258] *Id.* at 680.

IDV also asked, "why should we have an escrow, and for what purpose?"[259] Candor Compass explained that it provided insurance against the startup's failure.[260] IDV never pushed back or questioned its inclusion. Trial testimony also reflects IDV's principals knew what the escrow provision required.[261]

As a last resort, IDV argues that Candor Compass's decision not to address IDV's failure to set up an escrow account further proves the provision's uncertainty.[262] But Candor Compass knew IDV had not complied, and chose to tackle the bigger issue with Engage.[263] Both sides knew what the escrow provision meant.

The Term Sheet is sufficiently definite to create enforceable obligations. It is a binding Type I preliminary agreement.[264]

2. IDV Breached The Term Sheet.

The Term Sheet imposed on IDV binding delivery and escrow obligations, satisfying the first element of a claim for breach of contract. I turn now to whether

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[259] JX 101 at 2.

[260] *Id.*

[261] *See, e.g.*, Wilcox Tr. 596–97 (equating "IP" with IDV's patent); *id.* at 643–44 (interchanging the terms "IP" and "technology" in connection with the escrow provision); Candela Tr. 825–26.

[262] IDV Opening Br. 52–54.

[263] JX 234.

[264] This conclusion resolves IDV's counterclaim for breach of an agreement to agree.

Candor Compass has proven the remaining two elements for breach of contract, namely breach of the contractual obligation and a causally related injury.[265]

IDV did not deliver anything other than fleeting access to the platform via Engage, and a couple of documents.[266] It did not deliver anything else, like code.[267] It did not escrow anything.[268]

IDV says it did not need to. Specifically, IDV asserts the delivery and escrow provisions are silent as to a time for performance.[269] "Under Delaware law, if a contract does not specify a time for performance, the party has a reasonable amount of time to perform."[270] "In every contract there is implied a promise or duty to perform with reasonable expediency the thing agreed to be done; a failure to do so

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[265] *See AB Stable*, 2020 WL 7024929, at *47 ("The elements of a claim for breach of contract are (i) a contractual obligation, (ii) a breach of that obligation by the defendant, and (iii) a causally related injury that warrants a remedy, such as damages or in an appropriate case, specific performance.").

[266] JX 262 (patent application); JX 185 (document explaining a set of rules to be implemented in the platform).

[267] *See* Noteware Tr. 85, 88–89, 90 (confirming Candor Compass did not have access to any code).

[268] Wilcox Tr. 585 (confirming IDV never identified an escrow agent or negotiated an escrow agreement).

[269] IDV Opening Br. 60–65.

[270] *VRNS II, LLC v. Desmarias*, 2026 WL 226721, at *3 (Del. Super. Jan. 28, 2026) (citing *Pivotal Payments Direct Corp. v. Planet Payment, Inc.*, 2020 WL 7028597, at *8 (Del. Super. Nov. 30, 2020)); *see also* Restatement (Second) of Contracts § 41 (A.L.I. 1981).

is a breach of contract."[271] "What constitutes a 'reasonable time' is a question of fact, dependent on the circumstances of the case."[272]

In IDV's view, no performance was due before "the finalization of the legal tech platform."[273] The plain text says otherwise. The Term Sheet required IDV to escrow any material not provided to Candor Compass "not less frequently than monthly."[274] And IDV would have me read into the Term Sheet a condition precedent to its performance where none exists. As a general rule, "a condition precedent must be expressed clearly and unambiguously."[275] Nothing in the Term Sheet unambiguously hinges IDV's performance on a minimum viable product. The minimum viable product is not mentioned once in the Term Sheet.[276]

IDV's argument is also inconsistent with the trial record and any sense of reasonableness.[277] IDV contends the parties knew "the final legal tech platform was

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[271] *Comet Sys., Inc. S'holders' Agent v. MIVA, Inc.*, 980 A.2d 1024, 1034 (Del. Ch. 2008) (internal quotation marks omitted) (quoting 23 Williston on Contracts § 63:24 (4th ed.)).

[272] *Lewes Inv. Co., L.L.C. v. Est. of Graves*, 2013 WL 508486, at *17 (Del. Ch. Feb. 12. 2013).

[273] IDV Opening Br. 65.

[274] JX 140 at 5.

[275] *Thompson Street Cap. P'rs IV, L.P. v. Sonova U.S. Hearing Instruments, LLC*, 340 A.3d 1151, 1167–68 (Del. 2025) (quoting *Aveanna Healthcare, LLC v. Epic/Freedom, LLC*, 2021 WL 3235739, at *25 (Del. Super. July 29, 2021)).

[276] *See* JX 140.

[277] IDV's position is not supported by any credible testimony. When asked why IDV did not escrow anything, Wilcox testified:

still in development" and did not intend to create any escrow or delivery obligations concerning "an incomplete product."[278] But Candor Compass bargained for the escrow provision precisely because the platform was incomplete, in order to protect against the start-up's failure during development.[279] Noteware explained this to Wilcox during negotiations.[280] He clarified Candor Compass would "need the source code for the entire algorithm to be escrowed and available . . . should [Candor

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> I assumed that . . . what we were talking about is a product that when parties—I didn't assume that this was WIP, that this was work in progress activity. I assumed that—I did not assume that escrow was a work in progress action. I assumed it was post—and . . . that, in fact, if that escrow provision was required in what we were doing in real time with Engage, I would have expected Candor [Compass] to have raised the issue with me and said so how is MJ [Jabbour] escrowing?

Wilcox Tr. 680–82. As an initial matter, this winding testimony does not credibly express IDV's contemporaneous belief that it did not have to escrow anything until Engage completed development. And the preponderance of the evidence suggests Candor Compass did not ask IDV "how is MJ [Jabbour] escrowing" because it did not know Engage had unilateral control over the platform, along with its underlying technology. Noteware Tr. 82–83; Randall Tr. 315–16.

[278] IDV Opening Br. 64.

[279] Noteware Tr. 66 ("That's just the way escrows work, is that we wouldn't own it; it's theirs. But if they failed and we had to get access to it to continue the development, that's how you get it without them actually giving it to us up front.").

[280] *Id.* at 47–48; JX 101 at 2.

Compass] be forced *to complete development*."[281] It would not be reasonable to time IDV's performance only after a final product materialized.[282]

From there, IDV contends Candor Compass had sufficient access to the licensed technology even without IDV delivering it or escrowing it.[283] Regardless of whether this argument is framed as one against breach or against injury, it fails. It is true that Candor Compass could intermittently access the platform.[284] Candor Compass was in Jabbour's good graces, and could convince him to grant access for demonstration purposes.[285] But that access was fleeting; Engage shut it off after just a couple of months.[286] Candor Compass has not had access to the platform since at

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[281] JX 101 at 1 (emphasis added); *see also* Noteware Tr. 47 ("And I explained that they had to do it because if [IDV] failed—and we knew that it was running on fumes—we had to have access to the full technology so that we could continue development and finish it.").

[282] *Cf. Howard v. Howard*, 1990 WL 143876, at *3 (Del. Super. Jan. 31, 1990) ("[T]his Court is of the opinion that Howard has well exceeded any time span which may be deemed reasonable . . . .").

[283] IDV Opening Br. 66–73.

[284] *See* JX 171 at 2; Randall Tr. 352–53 ("We were able to convince MJ that if he were—if he provided us access to demo the software—in other words, if we could be granted access, he could turn the lights back on and he could teach myself to actually demo the software . . . we could use that to actually raise money and get him paid."); *id.* at 354 ("[W]e were given limited access to demo the technology to a third party.").

[285] *See* JX 171 at 2; Randall Tr. 352–53, 354.

[286] Randall Tr. 353.

least the summer of 2024.[287] It did not "have independent capability to operate it."[288] It could not continue development alone or hire others to do it. It could not show it to potential investors. Put another way, Candor Compass was "handcuffed" to Engage, who IDV did not pay.[289] By definition, Candor Compass could not run the licensed technology "independently."[290] This is a breach of the Term Sheet that harmed Candor Compass as it could not, and cannot, exercise the license it bargained for.

And Candor Compass tried to mitigate injury, trying to obtain access to the platform by playing the middleman between IDV and Engage to resolve outstanding payment issues.[291] When that failed, Candor Compass asked IDV to execute the Amended and Restated License Agreement so it could pitch the technology to a broader audience—at IDV's request—and get Engage paid.[292]

IDV breached the Term Sheet and caused Candor Compass harm.

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[287] *See id.* at 369 (explaining that in the summer of 2024, Randall "attempted to log back in to the interface and it was down"); Noteware Tr. 99 ("MJ [Jabbour] cut off access to the tools."); JX 264 at 1 ("[T]he Emotiv web interface is down as of some weeks ago, we certainly can't demo anything.").

[288] Noteware Tr. 99.

[289] *Id.* at 83.

[290] JX 140 at 4.

[291] Randall Tr. 349 ("[W]e had to go back to step zero and start figuring out a way for MJ [Jabbour] to get paid for work that he had done on behalf of IDV."); Noteware Tr. 84 ("[W]e start working with the IDV guys to get Engage paid.").

[292] JX 255.

B. IDV's Affirmative Defenses Fail.

IDV raises an array of affirmative defenses to Candor Compass's claims.[293] It leans heavily on two of them: prior material breach and unclean hands. Neither succeeds.

1. Prior Material Breach

IDV asserts Candor Compass committed a material breach justifying IDV's nonperformance of the Term Sheet. IDV contends Candor Compass never assigned IDV the equity it was due under the Term Sheet.

It is well-settled that "[a] party who first commits a material breach of a contract cannot enforce the contract going forward."[294] "The converse of this principle is that a slight breach by one party, while giving rise to an action for damages, will not necessarily terminate the obligations of the injured party to perform under the contract."[295] Under Delaware law, "a breach is material if it goes to the root or essence of the agreement between the parties, or touches the fundamental purpose of the contract and defeats the object of the parties in entering

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[293] *See* Am. Ans. at 27–31; IDV Opening Br. 79 n.4.

[294] *Preferred Inv. Servs., Inc. v. T & H Bail Bonds, Inc.*, 2013 WL 3934992, at *21 (Del. Ch. July 24, 2013) (citing *BioLife Sols., Inc. v. Endocare, Inc*., 838 A.2d 268, 278 (Del. Ch. 2003)).

[295] *Level 4 Yoga, LLC v. CorePower Yoga, LLC*, 2022 WL 601862, at *27 (Del. Ch. Mar. 1, 2022) (internal quotation marks omitted) (quoting *Brasby v. Morris*, 2007 WL 949485, at *4 (Del. Super. Mar. 29, 2007)).

into the contract."[296] Whether a breach is sufficiently material to justify nonperformance "entails a fact-specific weighing analysis."[297]

The record lacks evidence that Candor Compass properly assigned equity to IDV. At trial, Noteware and Randall testified that they believed the Term Sheet automatically effectuated an equity assignment.[298] Candor Compass's company records say otherwise. Candor Compass never issued a "certificate or other indicia of ownership . . . evidencing [IDV's] ownership" interest.[299] Nor did it list IDV on its ownership schedule in its operating agreement.[300] It did not include IDV on its capitalization table dated January 30, 2024, months after the assignment would have

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[296] *Mrs. Fields Brand, Inc. v. Interbake Foods, LLC*, 2017 WL 2729860, at *28 (Del. Ch. June 26, 2017); *Simon-Mills II, LLC v. Kan Am USA XVI Ltd. P'ship*, 2017 WL 1191061, at *29 (Del. Ch. Mar. 30, 2017) (quoting *Preferred Inv. Servs.*, 2013 WL 3934992, at *11).

[297] *Simon-Mills*, 2017 WL 1191061, at *29 (citing *BioLife*, 838 A.2d at 278); *see* Restatement (Second) of Contracts § 241 (A.L.I. 1981) (enumerating five factors to consider in determining whether one party's breach is sufficiently material to justify the other's nonperformance).

[298] Noteware Tr. 205 ("[W]hen the [Term Sheet] was signed, they owned it. It's not like you have stock certificates."); Randall Tr. 348–49 ("[I]n my view, the moment we signed th[e] [Term Sheet], that transition was effective. The assignment was effective.").

[299] Candela Tr. 818–19; Wilcox Tr. 589–90.

[300] JX 335 § 1 (defining "Share Certificate" as "the certificate or other indicia of ownership of Shares evidencing a Member's ownership thereof"); *id.* §§ 7(b), 7(f) (explaining that "[t]he number of Shares and Percentage Interest of each Member shall be as set forth in Schedule 1 hereto"); *id.* at Sched. 1 (listing only David and Shari Noteware as common members).

occurred.[301] Its board meeting minutes dated the same day state "Noteware owns 100% of the founding units."[302] Candor Compass's explanation—"sloppy" internal recordkeeping—does not change the fact that there is no evidence of an effective equity assignment.[303] IDV has shown a breach.

So the question is whether that breach is material enough to excuse IDV's performance. I conclude it is not. IDV contends the nonassignment was a material breach because IDV's equity interest was "the only initial consideration underpinning the Term Sheet."[304] That is plainly incorrect. Consideration is the bargained-for exchange of legal value.[305] In exchange for a license, IDV bargained for—and Candor Compass promised—three forms of compensation: (1) royalties amounting to 2% of net profits for nine years, declining by 1/9th per year; (2) an 8%

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[301] *Compare* JX 180 (Candor Compass board minutes dated January 30, 2024), *with* JX 341 (Candor Compass capitalization table dated January 30, 2024 but edited on February 10, 2025); *see also* Noteware Tr. 233.

[302] JX 180 at 2.

[303] Noteware Tr. 273–74 ("Well, part of the challenge was that we didn't have any outside investors and we hadn't had any tax filings and we hadn't done anything. So truth be told, it was just an internal document. And as [counsel] noted, it was sloppy. But it never went to anybody outside.").

[304] IDV Opening Br. 82.

[305] *See E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 446 (Del. 1996) ("Contracting is a bargained-for exchange."); Restatement (Second) of Contracts § 71(1) (A.L.I. 1981) ("To constitute consideration, a performance or a return promise must be bargained for."); *see also First Mortg. Co. of Pa. v. Fed. Leasing Corp.*, 456 A.2d 794, 795–96 (Del. 1982) ("[I]f the promisee parts with something at the promisor's request, it is immaterial whether the promisor receives anything…." (citation omitted)).

equity interest in Candor Compass; and (3) a $60,000 upfront fee "ow[ed]" immediately upon execution of the Term Sheet for accounting purposes, but payable when Candor Compass gets acquired or earns $2 million in a fiscal year.[306] The failure to properly assign equity did not leave the Term Sheet unsupported by consideration.

And Candor Compass believed the assignment was effective.[307] It even tried to repurchase equity from IDV when it declared IDV in breach.[308] Once the deficiency was pointed out, Noteware updated Candor Compass's January 30, 2024 capitalization table to reflect IDV's ownership interest.[309] Candor Compass's interim failure to effectuate or memorialize the assignment was unintended, had no effect on IDV, and was readily curable.[310]

More importantly, IDV has not shown the breach went to the root of the Term Sheet. IDV licensed its technology in exchange for something IDV could tout to investors as a source of near-term revenue: royalties and an upfront fee.[311] That was

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[306] JX 140 at 3–5.

[307] Noteware Tr. 205; Randall Tr. 348–49.

[308] PTO ¶¶ 16, 17; JX 303.

[309] *See* JX 341 (capitalization table dated January 30, 2024, but edited on February 10, 2025); Noteware Tr. 233.

[310] *See* Noteware Tr. 233, 273. *Compare* JX 180 (Candor Compass board minutes dated January 30, 2024), *with* JX 341 (Candor Compass capitalization table dated January 30, 2024, but edited on February 10, 2025).

[311] *See* Wilcox Tr. 575–76.

the centerpiece of the parties' negotiations.[312] The equity interest was certainly a piece of the deal's overall consideration. But it was not "so fundamental to [the] contract" that an ineffective assignment "defeat[ed] [its] essential purpose."[313] IDV got what it wanted: booking the upfront fee on its financials and showing investors it had a "go-to-market partner."[314] IDV's prior material breach defense fails.

2. Unclean Hands

As a last resort, IDV argues Candor Compass is not entitled to relief under the doctrine of unclean hands on two grounds. First, it points again to the equity assignment issue.[315] Second, it conjures up a conspiracy between Candor Compass and Engage to claim IDV's technology as their own.[316]

"The doctrine of unclean hands provides that a litigant who engages in reprehensible conduct in relation to the matter in controversy forfeits his right to have the court hear his claim, regardless of its merit."[317] "The Court invokes the doctrine when faced with a litigant whose acts threaten to tarnish the Court's good

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[312] JX 118 at 5 ("[Candela] wants to find some way to recognize revenue/raise an invoice and show revenue from the deal.").

[313] 23 Williston on Contracts § 63:3 (4th ed. May 2026 update).

[314] Wilcox Tr. 575–76, 688; Candela Tr. 817–18.

[315] IDV Opening Br. 85–86.

[316] *Id.* at 87–88.

[317] *Am. Healthcare Admin. Servs., Inc. v. Aizen*, 285 A.3d 461, 494 (Del. Ch. 2022) (emphasis omitted) (quoting *Portnoy v. Cryo-Cell Int'l, Inc.*, 940 A.2d 43, 81 (Del. Ch. 2008)).

name. In effect, the Court refuses to consider requests for equitable relief in circumstances where the litigant's own acts offend the very sense of equity to which he appeals."[318]

The operative question "raised by a plea of unclean hands is whether the [plaintiff's] conduct is so offensive to the integrity of the court that his claims should be denied, regardless of their merit."[319] And "[i]f unclean hands is the sole reason for refusing relief and the opposing party has not been harmed by the inequitable conduct, the Court of Chancery ordinarily will not apply the doctrine."[320] "Cases turning on matters related to unclean hands are infrequent as a matter of course."[321] This case is no outlier.

IDV sees unclean hands in Noteware updating Candor Compass's capitalization table to reflect an assignment that never happened;[322] I see a good faith

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[318] *Nakahara v. NS 1991 Am. Tr.*, 718 A.2d 518, 522 (Del. Ch. 1998).

[319] *Gallagher v. Holcomb & Salter*, 1991 WL 158969, at *4 (Del. Ch. Aug. 16, 1991), *aff'd sub nom. New Castle Ins., Ltd. v. Gallagher*, 1997 WL 123582, at *1 (Del. Mar. 5, 1997) (TABLE).

[320] *Universal Enters. Gp., L.P. v. Duncan Petroleum Corp.*, 2014 WL 1760023, at *8 (Del. Ch. Apr. 29, 2014) (citation omitted); *see also Bodley v. Jones*, 59 A.2d 463, 470 (Del. 1947) ("[I]n applying the maxim regard at all times should be had for the doctrine that improper acts committed on the part of a complainant seeking the aid of the Court of Equity should not be the sole cause of the denial of relief, if no injury whatsoever resulted to the respondent therefrom." (citations omitted)).

[321] *Nakahara*, 718 A.2d at 522.

[322] *See* JX 341 (capitalization table dated January 30, 2024, but edited on February 10, 2025); Noteware Tr. 233.

effort to remedy a paperwork mistake. Noteware and Randall believed the assignment was effective.[323] Candor Compass tendered payment to repurchase the equity it believed IDV owned.[324] IDV did not raise the equity issue until litigation—even after the purported repurchase. Noteware tried to conform Candor Compass's capitalization table to his consistent understanding that IDV had always owned equity. I do not believe that conduct alone supplies a basis to refuse Candor Compass relief.[325]

IDV's remaining conspiracy theory finds no basis in the record. IDV claims Candor Compass "orchestrat[ed] a scheme" to partner with Engage behind IDV's back, all while Noteware "simultaneously acted as [IDV's] trusted advisor."[326] The theory rests on communications and meetings between Candor Compass and Engage that did not include IDV.[327] For instance, in December 2023, Candor Compass told Jabbour it would "step into the void as soon as [IDV] get[s] [its] act together."[328] In June 2024, it met Jabbour without "anyone from IDV" to discuss "where the

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[323] Noteware Tr. 205; Randall Tr. 348–49.

[324] PTO ¶¶ 16, 17; JX 303.

[325] *See Universal Enters.*, 2014 WL 1760023, at *8.

[326] IDV Opening Br. 87–88.

[327] *Id.*; *see, e.g.*, JX 152; JX 204; JX 249; JX 293.

[328] JX 152 at 1.

technology stands."[329] And in August, Engage sent Candor Compass a document titled "Candor Compass – Engage Collaboration."[330]

Here too, IDV grossly mischaracterizes Candor Compass's actions. It was trying to save the platform for both Candor Compass and IDV. IDV needed Engage: it controlled the platform containing IDV's technology, and it was performing essential development work. But IDV lost Engage's trust.[331] Candor Compass was able to serve as a middleman. IDV told Candor Compass that "[i]f [Candor Compass] wish[ed] to contract with MJ and the team," it could.[332] When Noteware told Jabbour that Candor Compass would "step into the void,"[333] it was asking Engage to have faith in the venture because Candor Compass would take on more of a main character role in the tripartite relationship.[334] When Candor Compass met with Engage throughout the spring, it was to push forward with product development

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[329] JX 204 at 2–3.

[330] JX 293.

[331] Randall Tr. 351 ("It was always from Ian [Wilcox] and it was, hey, that the check's going to clear in two weeks. There's money in Montenegro. I could go back and catalog a number of different promises that, hey, we expect to have money on such and such a date . . . . And I kept relaying promises from Ian [Wilcox] to MJ [Jabbour], saying, hey, don't worry. You'll get paid. Stay at the table. That became increasingly harder to do, being that those promises never were borne out.").

[332] JX 152 at 3.

[333] *Id.* at 1.

[334] *See* Randall Tr. 443–44.

as an IDV licensee, not as an IDV competitor.[335] And the record shows Candor Compass tried to work with IDV until the end: even after it contemplated declaring IDV in breach, Candor Compass proposed the Amended and Restated License Agreement in an attempt to reaffirm and expand their licensing relationship to benefit both parties.[336]

IDV fixates on a document from August 2024 titled "Candor Compass – Engage Collaboration."[337] Engage created this document to lay out a "strategic plan" to "separate from Emotize, secure outstanding payments, and establish a partnership path to monetize already built technology."[338] There is no evidence Candor Compass had any role in making this document, or this plan. At most, this was Engage's fallback after Candor Compass tried and failed to save the relationship with IDV, including with the Amended and Restated License Agreement one month earlier. By August, IDV knew everyone's patience was running out.[339] It was told

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[335] *See id.* at 356; JX 204.

[336] *See* JX 255.

[337] JX 293.

[338] *Id.* at 1; *see* Noteware Tr. 275–77.

[339] *See* JX 301 at 1 ("While you were away I had a couple [of conversations] with [Noteware] and a call with MJ, Ross and David . . . . The general consensus is that IDV has not made good on any financial commitments in over a year . . . . There is a strong sense of skepticism and loss of credibility that I cannot overcome.").

that if IDV did not pay, "Candor [Compass could] no longer wait for IDV to advance things forward."[340]

There is simply no evidence of an inequitable scheme to steal IDV's technology. Candor Compass was patient and proactive for months, but its patience ran out and its efforts did not succeed. IDV's unclean hands defense fails.

C. Candor Compass Is Entitled To Specific Performance And Declaratory Relief.

In the Term Sheet, the parties agreed that in the case of a breach by IDV, IDV must transfer ownership of the licensed technology to Candor Compass.[341] Candor Compass seeks an order of specific performance to enforce that obligation.[342]

"To say that Delaware prides itself on the contractarian nature of its law risks understatement[.]"[343] "[W]here Delaware's law applies, with very limited exceptions, our courts will enforce the contractual scheme that the parties have arrived at through their own self-ordering, both in recognition of a right to self-order and to promote certainty of obligations and benefits."[344] "Delaware courts extend

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[340] *Id.*

[341] JX 140 at 5 (providing that if IDV "breaches this license agreement, . . . all Technology and escrowed material shall be automatically conveyed in fee simple to Licensee").

[342] Compl. ¶¶ 37–40.

[343] *New Enter. Assocs. 14, L.P. v. Rich*, 295 A.3d 520, 565–66 (Del. Ch. 2023).

[344] *Ascension Ins. Hldgs., LLC v. Underwood*, 2015 WL 356002, at *4 (Del. Ch. Jan. 28, 2015).

these contractarian policies to their treatment of remedy provisions."[345] "[O]ur courts favor enforcement of remedy provisions calling for specific performance."[346] "Requiring parties to live with 'the language of the contracts they negotiate holds even greater force when, as here, the parties are sophisticated entities that bargained at arm's length.'"[347]

Still, "a court is not required to enforce a specific performance provision."[348] Specific performance remains a matter of equitable discretion.[349] It is available where a party lacks an adequate legal remedy and establishes, by clear and convincing evidence, that "(1) a valid contract exists; (2) it is ready, willing, and

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345 *L-5 Healthcare P'rs, LLC v. Alphatec Hldgs., Inc.*, 2024 WL 3888696, at *7 (Del. Ch. Aug. 21, 2024) ("Our courts have explained that '[w]here parties have expressed their expectations through a specific contractual remedy, Delaware law favors enforcing that remedy.'").

346 *Id.* at *7; *see also Mercury P'rs Mgmt., LLC v. Valo Health, Inc.*, 2024 WL 413784, at *2 (Del. Ch. Feb. 5, 2024) (explaining that where a party agrees to such a provision "the party must establish a persuasive case-specific [reason] why the clause should not be respected" (quoting *Am. Healthcare*, 285 A.3d at 495)).

347 *L-5 Healthcare*, 2024 WL 3888696, at *7 (quoting *In re Cellular Tel. P'ship Litig.*, 2021 WL 4438046, at *72 (Del. Ch. Sept. 28, 2021)).

348 *Am. Healthcare*, 285 A.3d at 495 (Del. Ch. 2022); *see also Meteora Cap. Par's, LP v. Roadzen Inc.*, 2026 WL 2530118, at *23–24 (Del. Ch. Aug. 27, 2026); *Godwin v. Collins*, 3 Del. Ch. 189, 200 (Del. Ch. 1868) ("It is the established doctrine of courts of equity that a decree for the specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court upon a view of all the circumstances.").

349 *See Peden v. Gray*, 2005 WL 2622746, at *3 (Del. Oct. 14, 2005) (TABLE) ("[S]pecific performance is a matter of grace that rests in the sound discretion of the court." (citing *Safe Harbor Fishing Club v. Safe Harbor Realty Co.*, 107 A.2d 635, 638 (Del. Ch. 1953))).

able to perform; and (3) the balance of equities tips in its favor."[350] I have found the Term Sheet constitutes a valid contract with enforceable terms. The parties do not dispute that Candor Compass lacks an adequate remedy at law and that it stands ready, willing, and able to perform. That leaves the balance of the equities. I conclude the equities favor an award of specific performance.

"[E]quity regards that as done which in good conscience ought to be done."[351] "The equities generally weigh against the breaching party, which only need do what it agreed to do in the first place."[352] "The equities fall particularly hard against a party that has engaged in 'opportunistic maneuvers to escape its contractual obligations' that 'offend basic notions of equity.'"[353] IDV is correct that specific performance "will generally not be granted where it will visit an undue hardship on the opposing party."[354] But this Court has made clear that "the remedy will not be

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[350] *Fortis Advisors, LLC v. Krafton, Inc.*, 354 A.3d 906, 948–49 (Del. Ch. 2026) (citing *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010)).

[351] *Monroe Park v. Metro. Life Ins. Co.*, 457 A.2d 734, 737 (Del. 1983).

[352] *Global Cap. P'rs*, 355 A.3d at 181 (citing *Level 4 Yoga*, 2022 WL 601862, at *30, and then *Hastings Funeral Home, Inc. v. Hastings*, 2022 WL 16921785, at *8 (Del. Ch. Nov. 14, 2022)); *see Level 4 Yoga*, 2022 WL 601862, at *30 ("And, as CorePower breached the APA notwithstanding its exercise of the Call Option and its commitment to honor the Call Option Agreement and Call Option Exercise Agreement . . . .").

[353] *Global Cap. P'rs*, 355 A.3d at 181 (quoting *Sarissa*, 2017 WL 6209597, at *27).

[354] *D GYMS, L.L.C. v. Robino-Bay Ct. Plaza, LLC*, 2009 WL 196299, at *4 (Del. Ch. Jan. 15, 2009).

denied when the hardship is the result of the 'defendant's own acts or is clearly foreseeable.'"[355]

IDV promised to hedge against its own failure by giving Candor Compass access to the technology and developing platform. IDV hid its problems with Engage from Candor Compass, keeping it in the dark until the Term Sheet was signed.[356] Then IDV did not do what it promised to protect Candor Compass from those very problems: deliver and escrow the technology as it was being developed. IDV gave Candor Compass a license it could not use. IDV knew the remedy for breach would be a transfer of ownership. IDV has nobody to blame but itself.[357]

IDV also argues that specific performance would be inequitable because it would provide Candor Compass with a windfall.[358] Not so. The purpose of specific performance "is to place the aggrieved party in the position that it would have been in but for the breach."[359] The Term Sheet's "fundamental purpose" was to provide

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[355] *Id.* (quoting *Craft Builders, Inc. v. Ellis D. Taylor, Inc.*, 254 A.2d 233, 236 (Del. 1969)).

[356] Noteware Tr. 82–83; Randall Tr. 315–16.

[357] A finer parsing of responsibility would lay many of IDV's troubles at Wilcox's feet. The trial record revealed Wilcox to be a font of chaos. I do see some inequity in requiring Candela to transfer his ideas to Candor Compass when he was not the main character in the breach. But agency theory prevails: Wilcox was IDV's CEO.

[358] IDV Opening Br. 98–100.

[359] *Currax Pharmaceuticals LLC v. OptiNose AS*, 2021 WL 223810, at *4 (Del. Ch. Jan. 22, 2021) (quoting *Moore Bus. Forms, Inc. v. Cordant Hldgs. Corp.*, 1998 WL 71836, at *9 (Del. Ch. Feb. 4, 1998)); *see also 26 Cap. Acq. Corp. v. Tiger Resort Asia Ltd.*, 309 A.3d 434, 464 (Del. Ch. Sept. 7, 2023) ("Specific performance is a specialized form of mandatory injunction that requires a party to fulfill its contractual obligations."); *L-5*

Candor Compass with a license and independent access to the technology.[360] The Term Sheet's delivery and escrow provisions were "crucial, bargained-for protection[s]" underpinning that license.[361] They insured against the risk that something on IDV's side could go wrong.[362] That risk materialized. But IDV's failure to comply with its escrow and delivery obligations meant Candor Compass could not move forward with product development and commercialization. Candor Compass is entitled to its second agreed-upon failsafe: a transfer of the intellectual property.

IDV proposes the Court disregard the specific performance provision and award a lesser remedy of a continued license subject to the Term Sheet. In my view, that would be impractical, and perhaps doomed for failure. IDV bore the burden of

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Healthcare, 2024 WL 3888696, at *11 ("An order of specific performance is intended to produce as nearly as is practicable the same effect that the performance due under a contract would have produced. It usually, therefore, orders a party to render the performance that he promised.").

[360] *AB Stable*, 2020 WL 7024929, at *98.

[361] *Krafton*, 354 A.3d at 949.

[362] *See* JX 101 at 1 ("We'll need the source code for the entire algorithm to be escrowed and available for management should [Candor Compass] be forced to complete development."); *id.* at 2 ("The escrow protects the licensee from any sort of problem at the licensor level. Given the instability at the SR[L] level, we'd need security that the code won't disappear into the ether."); JX 118 (explaining that an escrow requirement is "pretty common when there's a risk that the licensor is a start-up"); Noteware Tr. 47 ("I explained that they had to do it because if the S[RL] failed—and we knew that it was running on fumes—we had to have access to the full technology so that we could continue development and finish it.").

establishing "a persuasive case-specific [reason] why the [specific performance provision] should not be respected."[363] But IDV has not shown that its alternative solution would remedy its breach. It left this Court to scour the record for any indication it could perform. As best as I can tell, IDV lacks that capability. IDV still does not have free access to its technology, and it remains subject to Engage's good graces.[364]

In fashioning a remedy, this Court considers "the complexity of the undertaking and the associated difficulty of providing meaningful judicial oversight."[365] Even if IDV could deliver and escrow its work to date, if past is prologue, Candor Compass will again need this Court's help in enforcement. IDV's solution ropes this Court into constant enforcement of IDV's ongoing escrow and delivery obligations. Renewing Candor Compass's license would leave it in the

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[363] *Am. Healthcare*, 285 A.3d at 496.

[364] *See* JX 257; JX 264 (noting that Candor Compass could not access the technology because the web interface was down); Randall Tr. 352–53 (testifying that Candor Compass had access to the technology for a couple months before Jabbour shut it off again); *id.* at 354 (noting they were given limited access to demo it to a third party); *id.* at 369 (explaining that Candor Compass has not had access to the platform since summer of 2024); Noteware Tr. 82–83 ("We couldn't work on it if we didn't have the code. And the code was held by Engage, and Engage wasn't being paid and . . . threatening to cut off access."); *id.* at 88–89 (explaining that Candor Compass had to go through Engage to get access); *id.* at 99.

[365] *26 Cap.*, 309 A.3d at 465.

exact situation it was in when this litigation began: dependent on an unreliable licensor and an unpaid development team.[366]

So the equities favor enforcing the Term Sheet's specific performance provision to give Candor Compass the benefit of IDV's promises. Half-measures do no work here. Candor Compass is entitled to specific performance of IDV's promise to transfer ownership of the licensed technology. Candor Compass, too, is required to perform its obligations under the Term Sheet—namely, the obligation to assign equity to IDV.

Because Candor Compass has proven its entitlement to specific performance, it is entitled to a declaration that Candor Compass owns the licensed technology. Judgment is entered in Candor Compass's favor on all of its claims.

D. IDV Failed To Prove Its Breach Of Fiduciary Duty Counterclaim.

IDV asserts a counterclaim for breach of fiduciary duty premised on the same scheme underlying its unclean hands defense.[367] "The elements of a claim for breach of fiduciary duty are: (i) that a fiduciary duty exists; and (ii) that a fiduciary breached

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[366] *See* Candor Compass Reply Br. 78–79.

[367] *See* Am. Ans.; IDV Opening Br. 106–09 (arguing that "Candor Compass breached its fiduciary duties to [IDV] by secretly coordinating with Engage from June to August 2024 to cut [IDV] out of the legal tech platform development and commercialization").

that duty."[368] The claim fails at the first element: Candor Compass did not owe fiduciary duties to IDV as a joint venture partner.

"[J]oint venture status is established only where an express or implied contract is created."[369] Such a contract is necessary, but not sufficient, to create a joint venture. Labels are not dispositive. The enterprise "would also have to exhibit the judicially defined characteristics of a . . . joint venture."[370] Those characteristics are: "(1) a community of interest in the performance of a common purpose, (2) joint control or right of control, (3) a joint proprietary interest in the subject matter, (4) a right to share in the profits, [and] (5) a duty to share in the losses which may be sustained."[371]

The Term Sheet labels itself "an intellectual property license and joint venture agreement."[372] Noteware and Wilcox agreed to insert the "joint venture" language

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[368] *Hardy v. Hardy*, 2014 WL 3736331, at *11 (Del. Ch. July 29, 2014) (citing *Heller v. Kiernan*, 2002 WL 385545, at *3 (Del. Ch. Feb. 27, 2002), *aff'd*, 806 A.2d 164 (Del. 2002)).

[369] *Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 975581, at *2 (Del. Ch. Mar. 4, 2010) (citing 46 Am. Jur. 2d *Joint Ventures* § 9 (2009)), *aff'd*, 7 A.3d 485 (Del. 2010).

[370] *In re McKinney-Ringham Corp.*, 1998 WL 118035, at *2 (Del. Ch. Feb. 27, 1998).

[371] *Warren v. Goldinger Bros.*, 414 A.2d 507, 509 (Del. 1980) (quoting *Kilgore Seed Co. v. Lewin*, 141 So.2d 809, 810–11 (Fla. Dist. Ct. App. 1962)).

[372] JX 140 at 2.

during negotiations.[373] But aside from the label and a "community of economic interest," the parties had no more than an ordinary licensor-licensee relationship.[374]

There was no joint control. Neither entity controlled the other; IDV did not control or have a right to control commercialization efforts.[375] While IDV was entitled to an equity interest in Candor Compass and royalties amounting to 2% of net profits,[376] it had no duty to share in the losses sustained. These are the hallmarks of a licensing arrangement, not a joint venture. Candor Compass did not owe any fiduciary duties to IDV. Judgment is entered in Candor Compass's favor on IDV's counterclaim.

E. Attorneys' Fees And Costs

Candor Compass seeks reasonable attorneys' fees and costs incurred in litigating this action. The Term Sheet includes a prevailing party provision: "In any dispute, the losing party will pay the litigation costs of the prevailing party."[377] The Term Sheet is enforceable, and Candor Compass is the prevailing party in this

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[373] JX 98 at 2.

[374] *In re Coffee Assocs., Inc.*, 1993 WL 512505, at *5 (Del. Ch. Dec. 3, 1993).

[375] JX 342 at 45–46 (Randall stating that "in terms of who is making day-to-day decisions on how we are going to commercialize the technology, that is myself and David").

[376] JX 140 at 4–5.

[377] *Id.* at 6; *see Bako Pathology LP v. Bakotic*, 288 A.3d 252, 281 (Del. 2022).

litigation. It is entitled to its reasonable attorneys' fees and costs pursuant to the Term Sheet.

III. CONCLUSION

Judgment is entered in Candor Compass's favor on its claims, as well as IDV's remaining counterclaims. Candor Compass is entitled to reasonable fees and costs incurred in litigating this action. Within twenty days, Defendants shall submit an affidavit under Court of Chancery Rule 88 itemizing their reasonable attorneys' fees and costs incurred. Candor Compass shall submit any objection within ten days. Once the amount of expenses, including attorneys' fees, and costs has been determined, the parties shall submit an implementing final order and judgment.