

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

DAVENPORT INVESTMENTS, LLC,	)	
	)	
Plaintiff,	)	C.A. No. N25C-01-330 MAA CCLD
	)	
v.	)	
	)	
TORO REAL ESTATE PARTNERS,	)	
LLC, DONALD A. DIRENZO, JR.,	)	
and JOHN COHEN,	)	
	)	
Defendants.	)	
	)	

Submitted: August 14, 2026

Decided: October 27, 2026

POST-TRIAL OPINION

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Adams, J.

INTRODUCTION

This post-trial opinion resolves a breach of contract action concerning a letter of intent for the creation of a joint venture to acquire and manage real estate. The parties executed the letter of intent, designating certain ancillary provisions as binding while simultaneously disclaiming any intent to be bound by the core economic terms of the proposed deal. After the letter of intent was executed but before a final agreement was established, negotiations fell apart, and one party decided to terminate the letter of intent. That same party elected to proceed in the property acquisition process without the other, leading the latter to sue, contending the former violated a binding exclusive-dealings provision in their letter of intent.

The Court finds the party that terminated the letter of intent and then proceeded with the real estate acquisition breached the exclusivity provision. Despite this breach, the non-breaching party failed to prove damages for the breach. The non-breaching party relied on an expectation damages theory but did not have a final agreement to buttress their expectations.

The Court further finds the party that terminated the letter of intent is entitled to the return of a deposit they provided to the other party for due diligence pursuant to a term in the letter of intent, which the latter has not proven was spent on due diligence. The parties' remaining claims fail. Judgment is entered accordingly.

FINDINGS OF FACT¹

A. The Parties and Relevant Non-Parties

Plaintiff Davenport Investments, LLC (“Davenport”) is an investment firm that invests in multi-family commercial real estate.² John Quinn and James Quinn (brothers) are members of Davenport, having a 25% interest each.³

Defendant Toro Real Estate Partners, LLC (“Toro”) was formed by Defendants Donald A. Drenzo, Jr. and John Cohen (together with Toro, “Defendants”) in 2015.⁴ Toro is a real estate development business that facilitates transactions for the acquisition of real estate properties.⁵

B. The Properties and Initial Negotiations with Davenport

On October 26, 2018, Toro entered into an agreement to purchase the “River City Landing” multi-family apartment complex property located in Jacksonville, Florida.⁶ On January 4, 2019, Toro entered into an agreement to purchase the “Whispering Oaks” and “Highlander” multi-family apartment complex properties

¹ The facts referenced herein are either findings of the Court by a preponderance of the evidence or stipulated by the Parties.

² D.I. 28 (“PTO”) at 5. Unless otherwise specified, docket item citations (“D.I.”) refer to the Superior Court Docket N25C-01-330 MAA CCLD. Citations to items on the original Court of Chancery docket for this action are in the form of “2019-0284-MTZ, D.I. X.”

³ *Id.* at 6.

⁴ *Id.* at 5.

⁵ *Id.*

⁶ *Id.* at 3, 6.

located in Jacksonville, Florida (the Highlander, Whispering Oaks, and River City Landing properties are referenced, together, as the “Properties.”)⁷

On February 8, 2019, Davenport contacted Cohen, seeking investment opportunities.⁸ Interested in getting Davenport to invest in the Properties before the acquisition transactions closed, on February 11, 2019, Defendants sent Davenport documents and information concerning the Properties, enabling Davenport to conduct due diligence on the investment opportunity.⁹

On March 8 and 11, 2019, the Parties executed a Letter of Intent (the “LOI”) for a joint venture between Davenport and Toro (the “Joint Venture”).¹⁰ As of March 8, 2019, Toro was scheduled to close the acquisitions of the Highlander and Whispering Oaks properties on March 29, 2019 and close the acquisition of the River City Landing property on April 19, 2019, meaning the time between the execution of the LOI and the closings was limited.¹¹

C. The LOI

The LOI contemplated the creation of the Joint Venture—an entity to operate the Properties for the benefit of the investors.¹² Section 1 of the LOI explains that Exhibit A attached to the LOI constitutes a term sheet for the proposed Joint Venture

⁷ *Id.* at 3, 6.

⁸ PTO at 6.

⁹ *Id.*

¹⁰ *Id.* at 7; PX 1.

¹¹ PTO at 7.

¹² PX 1 § 1.

Agreement, which would govern the management of the Joint Venture.¹³ Section 4 of the LOI provides Davenport would draft the Joint Venture Agreement during due diligence.¹⁴

Exhibit A of the LOI's term sheet for the Joint Venture Agreement provides Davenport would make a multi-million dollar "Preferred Equity Investment" in the Joint Venture to contribute to the acquisition and management of the Properties.¹⁵ The term sheet specifies the capital contribution from Davenport was to be made "[a]t the closing" for each of the Properties.¹⁶ The term sheet also provides part of the Joint Venture would be funded by the securing of a loan subject to Davenport's approval.¹⁷

Section 2 of the LOI acknowledges DiRenzo and his father were acquiring a tenancy-in-common interest in the Properties pursuant to certain tax considerations.¹⁸ Section 2 further provides that, after each closing, the tenancy-in-common interests would ultimately be conveyed back to the Joint Venture (the "TIC Rollup").¹⁹

¹³ *Id.*

¹⁴ *Id.* § 4.

¹⁵ PX 1 Ex. A.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ PX 1 § 2; PTO at 11.

¹⁹ PX 1 § 2.

Section 7 of the LOI provides the following:

Until a Closing for each of the Properties is consummated with respect to all of the Properties, [Defendants] will not, directly or indirectly, commit to, or negotiate or discuss with, any other person or entity any proposal regarding the formation or capitalization of the Company or the acquisition of or investment of equity into the Properties (or any alternative to the transaction contemplated in this letter, including any alternative transaction that would replace all or part of the “Preferred Equity Investment”, hereinafter defined) and will use good faith efforts to facilitate Davenport’s due diligence. The foregoing shall not be construed to prohibit [Defendants] from negotiating with prospective investors who will provide a portion of the “Common Equity Investment” (as defined below)...so long as their provision of a portion of the Common Equity Investment does not reduce, eliminate, or dilute the Preferred Equity Investment. In recognition of the investment of time and money being made by the Investor Parties in reliance on the exclusivity provisions in this paragraph, the Investor Parties shall have the right to pursue any and all claims in law or equity for a breach of the exclusivity provisions without regard to any limitations on those rights elsewhere in this letter.²⁰

This provision is titled “Exclusivity” (the “Exclusivity Provision”).²¹

Section 8 of the LOI provides Defendants would be responsible for Davenport’s out-of-pocket costs for due diligence and would pay Davenport deposits totaling \$100,000 to cover these costs (the “Due Diligence Deposit”).²² The Due Diligence Deposit was not refundable unless a portion remained unspent in the event the LOI was terminated.²³

²⁰ *Id.* § 7.

²¹ *Id.*

²² *Id.* § 8; PTO at 9.

²³ PX 1 § 8.

Section 10 of the LOI provides much of its contents are non-binding and that “neither this letter nor the [term sheet found at the attached Exhibit A] constitutes an offer or a commitment by the Parties.”²⁴ Sections 7 and 8 are excepted from this declaration, being binding.²⁵

At the time the LOI was signed, Davenport was the only preferred equity investor in the Properties, but Defendants had received commitments from other common equity investors, including DiRenzo and Cohen.²⁶

D. Post-LOI Negotiations fall apart.

After the execution of the LOI, during the week of March 11, 2019, the Parties continued working to create a final Joint Venture Agreement. During that week, Davenport raised concerns about whether a lender providing capital for the Whispering Oaks/Highlander purchase had approved the ownership structure outlined in the LOI, including the TIC Rollup.²⁷ The Parties engaged in various calls to attempt to alleviate Davenport’s concerns, but by March 15, 2019, Davenport refused to approve the proposed loan for the Joint Venture due to its concerns the lender had not given adequate approval of the proposed ownership structure post-TIC Rollup.²⁸ Davenport would not approve the loan, meaning Davenport would

²⁴ *Id.* § 10.

²⁵ *Id.*

²⁶ PTO at 10-11.

²⁷ Trial Transcript October 27, 2025 (“Tr. 10/27”) at 26:2-6. Citations to the trial transcripts for this action are in the form of “Tr. [month]/[day] at X.”

²⁸ Tr. 10/28 at 45:12-13, 46:6-17.

not agree to enter the Joint Venture with that loan. During this week-long dispute, Davenport had ceased drafting of the Joint Venture Agreement, with the first round of closings approaching on March 29, 2019.²⁹

On March 15, 2019, at 4:27 PM, two weeks before closing and after a week-long dispute over the loan, a representative of Davenport sent an email to Cohen and DiRenzo, asking for a voluminous list of additional due diligence items in the “near future,”³⁰ despite the fact that Defendants had already provided documentation on the Properties to Davenport in February.

On March 15, 2019, at 5:49 PM, Cohen sent an email to Justin Sperling, stating “we want to get davenport [*sic*] out of the deal you free for a quick call?”³¹ On March 16, 2019, DiRenzo called John Quinn to inform him Defendants intended to proceed without Davenport. DiRenzo explained to John Quinn that Defendants had made their decision in part because of a dispute over the loan and because Davenport never committed to fund the Joint Venture, even though the first closing was less than two weeks away.³²

On March 19, 2019, and March 22, 2019, John Quinn and counsel for Davenport wrote to Defendants, disputing the validity of Defendants’ termination of

²⁹ Tr. 10/27 at 116:7-117:19.

³⁰ PX 25.

³¹ PX 29 at TOROEML_00012973.

³² Tr. 10/29 at 82:15-84:11.

the LOI.³³ On March 24, 2019, DiRenzo wrote to Davenport, cancelling the LOI in writing.³⁴

On March 29, 2019, Toro closed on the acquisition of the Whispering Oaks and Highlander properties, without Davenport's investment.³⁵ The close was all-cash, not funded by a loan, because the loan was not ready.³⁶ On May 8, 2019, Toro closed on the River City Landing property.³⁷

E. Litigation

On April 12, 2019, between the closings, Davenport initiated litigation in the Delaware Court of Chancery, seeking a preliminary injunction to block Defendants from closing on the River City Landing property without Davenport's investment.³⁸ The court denied the motion despite finding a colorable claim.³⁹

After discovery, on October 12, 2021, the parties appeared before the Court of Chancery on a motion for summary judgment, in which Vice Chancellor Glasscock expressed skepticism Davenport would be able to prove its entitlement to more than reliance damages for any breach of the LOI.⁴⁰

³³ PX 31; PX 36.

³⁴ PX 38.

³⁵ PTO at 15.

³⁶ Tr. 10/28 at 208:1-209:3; Tr. 10/29 at 85:13-19.

³⁷ PTO at 15.

³⁸ 2019-0284-MTZ, D.I. 3.

³⁹ D.I. 30 Ex. M at 12:6-14:15.

⁴⁰ 2019-0284-MTZ, D.I. 125 at 19:4-7 (Glasscock, V.C.: "But even so, the deal never happened. It didn't happen in that manner. It happened in a different manner. I don't see how you get anything but reliance damages out of it.").

After the Court of Chancery action was transferred to a different Vice Chancellor upon Vice Chancellor Glasscock's retirement,⁴¹ the Court of Chancery determined it lacked subject matter jurisdiction because the action was not for equitable relief.⁴² The case was transferred to Superior Court, and the Court presided over a trial from October 27-29, 2025.⁴³ John and James Quinn testified, as did another Davenport representative, Nicholas Dinges, along with Cohen and DiRenzo.⁴⁴ At trial, Davenport presented an expert report on damages that presented a calculation for the profits Davenport lost by not being admitted into the Property acquisition—an expectation damages theory.⁴⁵ Davenport presented no reliance damages theory.

The Court heard post-trial argument on June 5, 2026.⁴⁶ The case is now ripe for resolution.

⁴¹ 2019-0284-MTZ, D.I. 160.

⁴² 2019-0284-MTZ, D.I. 164.

⁴³ D.I. 35.

⁴⁴ *Id.*

⁴⁵ PX 79.

⁴⁶ D.I. 49. The transcript for the post-trial argument became available on August 14, 2026, (D.I. 50) and the Court took the matter under advisement as of that date. D.I. 51.

STANDARD OF REVIEW

In a bench trial, the judge, as fact-finder,⁴⁷ “must assess the credibility of each witness and determine the weight given to the testimony.”⁴⁸ To reach a verdict on the issues, the court considers admitted exhibits, the testimony of witnesses, the Parties’ arguments, and Delaware law.⁴⁹ The court can consider “each witness’s means of knowledge; strength of memory; opportunity to observe; how reasonable or unreasonable the testimony is; whether it is consistent or inconsistent; whether it has been contradicted; the witnesses’ biases, prejudices, or interests; the witnesses’ manner or demeanor on the witness stand; and all circumstances that according to the evidence, could affect the credibility of the testimony.”⁵⁰ After reviewing the evidence presented, the court is “free to accept or reject any and or all sworn testimony.”⁵¹

A party bears the burden of proving its claims by a preponderance of the evidence.⁵² Proof by a preponderance of the evidence means “proof that something

⁴⁷ See, e.g., *Shallcross Mortg. Co. v. Ewing*, 2024 WL 3738713, at *1 (Del. Super. Aug. 9, 2024) (citation omitted).

⁴⁸ *Williams v. Bay City, Inc.*, 2009 WL 5852851, at *1 (Del. Super. Dec. 23, 2009) (internal citations omitted).

⁴⁹ *Outbox Sys., Inc. v. Trimble, Inc.*, 2024 WL 1886089, at *7 (Del. Super. Apr. 30, 2024).

⁵⁰ *Zenith Energy Terminals Joliet Hldgs. LLC v. CenterPoint Props. Tr.*, 2024 WL 3570165, at *3 (Del. Super. July 29, 2024) (citation omitted).

⁵¹ *Pardo v. State*, 160 A.3d 1136, 1150 (Del. 2017).

⁵² See, e.g., *Navient Sols., LLC v. BPG Off. P’rs XIII Iron Hill LLC*, 2023 WL 3120644, at *10 (Del. Super. Apr. 27, 2023) (citation omitted).

is more likely than not.”⁵³ If the evidence presented by the Parties “is inconsistent, and the opposing weight of the evidence is evenly balanced, then ‘the party seeking to present a preponderance of the evidence has failed to meet its burden.’”⁵⁴ “All elements of a claim must be proven by a preponderance of the evidence, including the plaintiff’s damages.”⁵⁵

ANALYSIS

A. Davenport’s Breach of Contract Claim Fails.

1. Defendants breached the Exclusivity Provision.

Davenport’s primary breach theory centers around the LOI’s Exclusivity Provision.⁵⁶ Davenport contends the exclusivity provision gave Davenport an absolute right to enter into the transaction as contemplated by the LOI, and Defendants breached this provision when they cut Davenport out of the deal.⁵⁷ Defendants contend they have not breached the Exclusivity Provision, as the negotiations with Davenport had failed and the Exclusivity Provision does not bar Defendants from closing the transaction once negotiations with Davenport broke down.⁵⁸

⁵³ *Feenix Payment Sys., LLC v. Blum*, 2024 WL 2768386, at *10 (Del. Super. May 29, 2024).

⁵⁴ *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 545 (Del. Super. 2005) (quoting *Eskridge v. Voshell*, 593 A.2d 589 (Del. 1991) (TABLE)), *aff’d*, 886 A.2d 1278 (Del. 2005).

⁵⁵ *Buck v. Viking Hldg. Mgmt. Co. LLC*, 2024 WL 4352368, at *21 (Del. Super. Sept. 30, 2024) (citation omitted).

⁵⁶ D.I. 41 (“Pl. OB”) at 29.

⁵⁷ Pl. OB at 29.

⁵⁸ D.I. 46 (“Def. RB”) at 2.

The Exclusivity Provision provides:

Until a Closing for each of the Properties is consummated with respect to all of the Properties, [Defendants] will not, directly or indirectly, commit to, or negotiate or discuss with, any other person or entity any proposal regarding the formation or capitalization of the Company or the acquisition of or investment of equity into the Properties (*or any alternative to the transaction contemplated in this letter, including any alternative transaction that would replace all or part of the “Preferred Equity Investment”, hereinafter defined*) and will use good faith efforts to facilitate Davenport’s due diligence. The foregoing shall not be construed to prohibit [Defendants] from negotiating with prospective investors who will provide a portion of the “Common Equity Investment” (as defined below)...so long as their provision of a portion of the Common Equity Investment *does not reduce, eliminate, or dilute the Preferred Equity Investment*. In recognition of the investment of time and money being made by the Investor Parties in reliance on the exclusivity provisions in this paragraph, the Investor Parties shall have the right to pursue any and all claims in law or equity for a breach of the exclusivity provisions without regard to any limitations on those rights elsewhere in this letter.⁵⁹

This provision is one of few in the LOI which the Parties designated as binding.⁶⁰

In interpreting contractual provisions, “Delaware follows the objective theory of contracts, where the parties’ intent is determined by considering only the four corners of the agreement. And where contract terms establish the parties’ common meaning, they control.”⁶¹

⁵⁹ PX 1 § 7 (emphasis added).

⁶⁰ *Id.* § 10.

⁶¹ *Exit Strategy, LLC v. Festival Retail Fund BH, L.P.*, 326 A.3d 356, 364 (Del. 2024) (citations omitted).

Defendants do not dispute DiRenzo called John Quinn and orally terminated the LOI on March 16, 2019.⁶² Defendants further do not dispute DiRenzo followed up on the March 16 call with a written termination of the LOI.⁶³ After terminating the LOI, Defendants closed on the Properties.⁶⁴ The remaining question is whether such a subsequent closing after the termination constitutes a breach of the Exclusivity Provision.

The Court agrees with Davenport that Defendants' conduct constitutes a breach of the Exclusivity Provision. The Exclusivity Provision provides Defendants could not commit to "any alternative to the transaction contemplated in this letter, including any alternative transaction that would replace all or part of" Davenport's investment.⁶⁵ Based on the plain language of this provision, Defendants could not enter into an alternative transaction for the Properties which would remove Davenport from the deal—they promised Davenport a piece of the deal if Davenport wished to take it. By terminating the LOI before Davenport ultimately decided whether or not it wanted to join the transaction and then proceeding to acquire the properties, Defendants breached this promise. Indeed, Defendants ultimately closed

⁶² Tr. 10/27 at 127:13-15.

⁶³ PX 38.

⁶⁴ Tr. 10/28 at 208:1-209:3.

⁶⁵ PX 1 § 7.

on the Properties without using Davenport’s investment—an “alternative transaction that [did] replace all” of Davenport’s investment with funds from other investors.

2. *Davenport has not proven damages for breach of the LOI.*

A breach of the Exclusivity Provision does not resolve Davenport’s claim: Davenport must prove it is entitled to damages by a preponderance of the evidence.⁶⁶ Davenport must show “the existence of damages provable to a reasonable certainty, and that the damages flowed from the defendant’s violation of the contract.”⁶⁷

Davenport contends it is entitled to expectation damages for Defendants’ breach of the Exclusivity Provision, constituting the value of Davenport’s lost profits from the investment in the Properties.⁶⁸ Defendants contend expectation damages are unavailable for the breach of the Exclusivity Provision, meaning Davenport could only recover reliance damages, the amount of which Davenport failed to prove at trial.⁶⁹ As Vice Chancellor Glasscock originally predicted, Davenport cannot show its entitlement to expectation damages. Davenport, having failed to present an alternative damages theory at trial cannot prove damages by a preponderance of the evidence, so its claim for breach of the Exclusivity Provision fails.⁷⁰

⁶⁶ *JanCo FS 2, LLC v. ISS Facility Servs., Inc.*, 344 A.3d 1009, 1038 (Del. Super. 2025) (citation omitted).

⁶⁷ *Base Optics Inc. v. Liu*, 2015 WL 3491495, at *16 (Del. Ch. May 29, 2015) (citation omitted).

⁶⁸ Pl. OB at 37.

⁶⁹ Def. RB at 3-4.

⁷⁰ Davenport emphasizes Vice Chancellor Glasscock’s decision to deny a motion *in limine* which would have precluded Davenport from presenting evidence on expectation damages at trial. D.I. 48 at 41 (citing 2019-0284-MTZ, D.I. 131, 170). The Vice Chancellor denied that motion *in limine*

“As a general matter, a remedy for breach of contract should seek to give the non-breaching party the benefit of its bargain.”⁷¹ These benefit-of-the-bargain damages constitute expectation damages. Reliance damages, by contrast, are defined as the damages a party sustained in relying on the breaching party’s promise—it is out of pocket *costs*, rather than its *potential profits*.⁷²

Vice Chancellor Glasscock highlighted the damages problem for the Parties during the hearing on the Defendants’ motion for summary judgment while the case was still pending in the Court of Chancery. The Vice Chancellor explained the deal, as contemplated by the LOI, “never happened. It didn’t happen in [the manner described in the LOI]. It happened in a different manner. I don’t see how you get anything but reliance damages out of it.”⁷³ In other words, because Davenport cannot show the same deal contemplated by the LOI was closed after the termination of the LOI, Davenport cannot show it would have been part of the deal contemplated by the LOI absent that termination.

The Vice Chancellor’s point is supported by the language in the Exclusivity Provision referencing “the transaction contemplated in this letter.” The LOI

because he determined was a motion for summary judgment in disguise, not because there was merit to the expectation damages theory. 2019-0284-MTZ, D.I. 170 at 4:16-23.

⁷¹ *In re Dura Medic Hldgs., Inc. Consolidated Litig.*, 333 A.3d 227, 255 (Del. Ch. 2025) (citation omitted).

⁷² *Greenfield One III GmbH & Co. KG, et al., v. Chris Chaney & IZERO LABS, INC., d/b/a FANCURVE, a Delaware corporation*, 2026 WL 3047089, at *12 (Del. Ch. Oct. 9, 2026) (citation omitted).

⁷³ 2019-0284-MTZ, D.I. 125 at 19:5-7.

describes an acquisition plan in which Davenport would provide certain funding for the acquisition *at closing* while other funds would be provided via a lender.⁷⁴ Because Davenport did not provide its funding at closing and the loan was not ready at the first closing, the acquisition of the Properties ultimately executed is not the same transaction as “the transaction contemplated in [the LOI]”—it is a different transaction bearing different economic terms and economic realities for Defendants.

Indeed, Davenport itself emphasizes this point, highlighting the ultimate execution of an all-cash acquisition for Whispering Oaks and Highlander Properties rather than a transaction funded by Davenport’s investment and an approved loan.⁷⁵ Davenport essentially implies that, in the face of the Parties’ disputes regarding the deal structure outlined in the LOI, Defendants were obliged to close all-cash, get a loan later, and admit Davenport after closing.⁷⁶ That purported obligation is not supported by the language of the Exclusivity Provision, which, as described above, only obliges Defendants to enable Davenport to enter into the transaction described in the LOI—economic terms outlined in the attached term sheet and all—not ensure Davenport found some way to invest even if the transaction contemplated by the LOI fell apart.

⁷⁴ PX 1 at Ex. A.

⁷⁵ Pl. OB at 14, 20-21.

⁷⁶ *Id.* at 21.

Thus, Davenport cannot show Defendants had finalized the transaction contemplated in the LOI without Davenport's investment or the loan—indeed, it would be impossible to do so, as Davenport's investment and the loan were core parts of the arrangement as described in the LOI. This presents a chicken-and-egg paradox: because Defendants terminated the LOI, it was impossible for Davenport to invest, which in turn ensured the transaction contemplated by the LOI was never completed.

The Court need not resolve this paradox here, as Davenport's claim for expectation damages is further frustrated by its own conduct, which prevents any factual finding the Parties would have closed the transaction pursuant to the terms outlined in the LOI had Defendants not terminated the LOI. Davenport has failed to prove it could expect the closure of the deal and is entitled to resulting expectation damages.

Davenport raised concerns about the transaction structure during the week of March 11, 2019—within a month of closing.⁷⁷ Davenport paused the drafting of a final Joint Venture Agreement between the parties⁷⁸—a task allocated to Davenport via the LOI.⁷⁹ Davenport purportedly paused this drafting because of its questions

⁷⁷ Tr. 10/28 at 180:15-181:15.

⁷⁸ Tr. 10/27 at 116:7-117:19.

⁷⁹ PX 1 § 4.

regarding the deal structure, but could not identify those questions.⁸⁰ Davenport never committed to invest in the transaction.⁸¹ Instead of committing, Davenport sent a voluminous due diligence request email on March 15, 2019—two weeks before the first round of closings, despite having already received voluminous due diligence, and without a Joint Venture Agreement draft ready.⁸²

In light of this record, Davenport cannot demonstrate it would have funded the transaction contemplated by the LOI at closing. Davenport's conduct instead indicates a strong hesitancy (if not unwillingness) to finalize the deal, and its current position that Defendants should have closed all-cash and admitted Davenport to the deal after closing further supports this read of the record.

Another court has addressed damages for breaches of a preliminary agreement such as the LOI and has concluded that reliance damages are the only available remedy. In *White Winston Select Asset Funds, LLC v. Good Times Restaurants, Inc.*, the United States District Court for the District of Delaware addressed a purported breach of a provision in a letter of intent obliging the parties to negotiate in good faith pending final resolution of the transaction contemplated.⁸³ The court explained the letter of intent did not constitute a final consensus on all points of the

⁸⁰ Tr. 10/27 at 184:21-185:16.

⁸¹ *Id.* at 157:11-22.

⁸² PX 25.

⁸³ 2022 WL 1659161 (D. Del. May 25, 2022)

transaction—a Type I preliminary agreement under Delaware Law—because the letter did not reflect a consensus on all terms of the final deal.⁸⁴ Nor did the letter constitute a final consensus on the major terms of the final deal, with a promise to resolve open issues later—a Type II agreement—because the letter did not bind the parties to any major terms of the final deal.⁸⁵ The court explained the letter of intent constituted a third type of preliminary agreement for which only reliance damages were available because “the preliminary agreement does not nail down enough of the final deal” for expectation damages to be accurately assessed.⁸⁶

The instant LOI is analogous to the letter of intent in *Good Times*. The LOI explicitly states that most of its terms are non-binding,⁸⁷ meaning it cannot constitute a final consensus of the parties on all terms (Type I agreement) or a resolution of major deal terms (Type II agreement). Instead, it constitutes that third category of preliminary agreement for which only reliance damages can be sought in the event of breach. The Parties did not bargain for a final deal in the LOI; the Court therefore cannot set damages based on the purported “expectation” that such a deal would definitively have been closed.

⁸⁴ *Id.* at *2.

⁸⁵ *Id.* at *2.

⁸⁶ *Id.* at *2.

⁸⁷ PX 1 § 10.

Because Davenport cannot show it would have been admitted to the “transaction contemplated in [the LOI]” but for Defendants’ termination and subsequent closing, and because the record instead reveals Davenport held the keys to its entrance into the transaction yet refused to use them, Davenport cannot show it is entitled to damages based on the benefit of a final closing of the transaction outlined in the LOI. Davenport’s only damages theory thus fails, and Davenport has failed to prove its breach of contract claim as the Exclusivity Clause by a preponderance of the evidence.

This issue with Davenport’s damages theory precludes success on any of its other breach claims concerning the LOI, as Davenport only alleges an expectation damages theory. Accordingly, all of Davenport’s breach of contract theories fail for lack of proof of damages.

3. The LOI is not a Type I agreement.

In the alternative to its breach claim regarding the Exclusivity Provision, Davenport contends the LOI is a Type I agreement, containing terms “so extraordinarily detailed and comprehensive that there were no remaining essential issues to resolve.”⁸⁸

Davenport’s attempt to cast the LOI as a Type I agreement is understandable, as it would enable Davenport to escape the damages issue analyzed above with

⁸⁸ Pl. OB at 32.

respect to its claim for breach of the Exclusivity Provision. For a Type I preliminary agreement, expectation damages are available for breach, because Type I agreements are “fully binding”⁸⁹—the parties to a Type I agreement expect the benefit of a formalized and closed deal, since they already bargained for that deal.

The Court already briefly addressed why the LOI is not a Type I agreement above, but the issue deserves a more fulsome analysis here. A Type I preliminary agreement, at its core, is a complete contract between the parties in which “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.”⁹⁰ Here, by contrast, the LOI explicitly manifests the parties’ intent to *not* be bound by its terms, *except* for specific binding provisions. Section 10 explains that:

(1) neither this letter nor the [attached term sheet for the joint venture] constitutes an offer *or a commitment by the Parties*, but rather they summarize certain of the general terms the parties are *considering* for purposes of entering into a possible transaction; (3) this letter and the [attached term sheet for the joint venture] are *non-binding and shall not create any obligation or liability on the part of [Davenport]* (including any obligation to start or continue negotiations), and no course of conduct or dealing (including discussions, negotiations, emails or other correspondence or the exchange of draft documents) shall create any binding obligations (other than a fully executed and delivered written agreement).⁹¹

⁸⁹ *Good Times*, 2022 WL 1659161, at *2 (citing *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 349 n. 82 (Del. 2013)).

⁹⁰ *SIGA Techs.*, 67 A.3d at 349 n. 82 (emphasis added).

⁹¹ PX 1 § 10 (emphasis added).

This non-binding declaration is only excepted as to certain terms, such as the Exclusivity Provision.⁹²

In light of the Parties' declaration they are *not* bound by the core terms of the LOI, including Section 1, which outlines the creation of the Joint Venture itself, and the Term Sheet for the Joint Venture Agreement attached as Exhibit A to the LOI, which outlines the actual economic terms for the Joint Venture. Davenport's contention the LOI reflects a complete contract between the Parties which would be formalized later is unfounded. Accordingly, Davenport cannot allege the breach of a Type I agreement and its entitlement to expectation damages.

4. Davenport has not proven a breach of a Type II agreement via breach of the LOI.

In the alternative to its breach claim regarding the Exclusivity Provision and argument the LOI is Type I preliminary agreement, Davenport contends the LOI is a Type II preliminary agreement, "leaving open items, if any, to be resolved by way of good faith negotiation."⁹³ Again, Defendants disagree.⁹⁴

In a Type II preliminary agreement, the parties agree to certain major terms of a transaction and then must negotiate open issues in good faith and consistent with the terms outlined in the preliminary agreement.⁹⁵ "A Type II agreement does not

⁹² *Id.* § 10.

⁹³ Pl. OB at 32.

⁹⁴ D.I. 40 ("Def. OB") at 20.

⁹⁵ *SIGA Techs.*, 67 A.3d at 349, 349 n. 85.

guarantee the parties will reach agreement on a final contract because of good faith differences in the negotiation of the open issues may preclude final agreement.”⁹⁶ For a Type II agreement, damages depend on whether a trial judge “makes a factual finding ... that the parties would have reached an agreement but for the defendant’s bad faith negotiations.”⁹⁷ If the trial judge finds an agreement would have been reached, expectation damages are in order.⁹⁸ If not, reliance damages are appropriate.⁹⁹

As articulated above, the Court does not find the facts in the record indicate, by a preponderance of the evidence, the Parties would have closed the transaction as contemplated in the LOI but for Defendants’ termination. Thus, even if the LOI is a Type II agreement, the difference is academic, as Davenport’s sole damages theory fails, and its breach of contract claim thus collapses.

Further, even if the Court were to hold the LOI constitutes a Type II agreement to negotiate open terms in good faith, nothing the record indicates Defendants negotiated with bad faith. In *SIGA Techs. Inc. v. PharmAthene, Inc.*, the defendant, after executing a Type II preliminary agreement, proposed significantly altered economic terms that dramatically increased the quality of the deal for the

⁹⁶ *Id.* (citation modified).

⁹⁷ *Id.* at 351.

⁹⁸ *Id.*

⁹⁹ *Good Times*, 2022 WL 1659161, at *2.

defendant.¹⁰⁰ The Court of Chancery held the defendant's decision to propose dramatically different terms from those reflected in the LOI constituted a bad-faith effort to torpedo the deal.¹⁰¹

Such a situation is absent here, as none of Defendants' conduct indicates an attempt to present terms for the final Joint Venture Agreement which was inconsistent with the LOI. Instead, as discussed above, the record shows Davenport, not Defendants, wanted to deviate from the deal structure because they were not satisfied with the impact of the loan on the TIC Rollup. Now, Davenport suggests Defendants should have closed all-cash and then worked Davenport into the Joint Venture after closing—a deviation from the deal structure outlined in the LOI. Defendants contend it wanted to close the deal pursuant to the terms outlined in the LOI, but Davenport was wavering.

Davenport emphasizes the email from John Cohen dated March 15, 2019, at 5:49 PM which says “we want to get davenport [*sic*] out of the deal...”¹⁰² In context, however, this email was sent *after* Davenport stopped drafting the Joint Venture Agreement due to questions about the transaction structure and could not be satisfied with the information provided by Defendants and *after* Davenport sent a voluminous supplemental due diligence request two weeks before the first closing (the email was

¹⁰⁰ *SIGA Techs.*, 67 A.3d at 339-40.

¹⁰¹ *Id.* at 346.

¹⁰² PX 29 at TOROEML_00012973.

sent on March 15, 2019 at 4:27 PM).¹⁰³ “[B]ad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity...it contemplates a state of mind affirmatively operating with furtive design or ill will.”¹⁰⁴ The March 15 at 5:49 PM email does not evince such a malicious state of mind, instead evincing the feeling of an impasse because Davenport had stopped progress on the rapidly-closing deal. The record contains no further evidence definitively showing bad faith on the part of Defendants. Because a Type II agreement does not guarantee the parties will close the deal, Davenport needed to show Defendants acted in bad faith, and they failed to do so.

Davenport has not shown bad faith on the part of Defendants in terminating the LOI. Further, Davenport cannot show the Parties would have closed but for Defendants’ conduct, so expectation damages are inapplicable regardless. Accordingly, the Type-II-preliminary-agreement doctrine does not salvage Davenport’s breach claim.

5. Davenport’s implied covenant claim fails.

Davenport contends its breach of contract action is alternatively viable pursuant to the implied covenant of good faith and fair dealing. Davenport contends that, to the extent the LOI does not contain the proper language binding Defendants

¹⁰³ PX 25.

¹⁰⁴ *SIGA Techs.*, 67 A.3d at 346 (quoting *CNL–AB LLC v. E. Prop. Fund I SPE (MS REF) LLC*, 2011 WL 353529, at *9 (Del. Ch. Jan. 28, 2011)).

to negotiate, in good faith, a final Joint Venture Agreement, the implied covenant fills this “gap.”¹⁰⁵

As an initial matter, this purported “gap” does not support an implied covenant claim. The implied covenant can only fill “gaps” in a contract to accommodate a factual development that “*could not be anticipated*, not developments the parties simply *failed to consider*.”¹⁰⁶ The potential for the deal to fall through and Defendants would terminate was not unable to be anticipated. Indeed, Section 10 of the LOI contains language indicating the parties acknowledged the possibility negotiations would fall apart.¹⁰⁷

Further, the implied covenant theory does nothing to rescue Davenport’s damages claim. Davenport still cannot show the deal would have been closed absent Defendants’ breach, so they cannot show entitlement to expectation damages.

None of Davenport’s theories for breach of contract have been adequately proven at trial. Accordingly, their breach of contract claim is DISMISSED in its entirety.¹⁰⁸

¹⁰⁵ Pl. OB at 34-35.

¹⁰⁶ *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (citation omitted, emphasis added). *See also Johnson & Johnson v. Fortis Advisors LLC*, 352 A.3d 229, 254-255 (Del. 2026) (restating the principles articulated in *Nemec* while noting “hindsight cannot correct oversight”).

¹⁰⁷ PX 1 § 10.

¹⁰⁸ Because the Court finds the breach of contract claim otherwise fails on the merits, Davenport’s arguments regarding the exchange of consideration for the LOI need not be addressed here. Pl. OB at 42.

B. Davenport's Tortious Interference Claim Fails.

Davenport contends DiRenzo and Cohen are liable for tortious interference because they interfered with a prospective contractual negotiation to facilitate their own interests when they caused Defendants to terminate the LOI.¹⁰⁹

“Individuals can induce a [company] to breach a contract, but cannot expect to be shielded from liability merely because of their title.”¹¹⁰ For such a cause of action to be viable, the agent of the relevant company must have been acting outside of the scope of their authority when they induced the company to breach a contract.¹¹¹

Once again, even if the Court were to find DiRenzo and Cohen tortiously interfered with the LOI and subsequent negotiations, Davenport has not proven damages for this tort. Davenport only alleges it is entitled to damages in the form of its lost expected profits upon execution of a final Joint Venture Agreement but cannot demonstrate Defendants' breach is the but-for cause of this injury, since Davenport cannot show it would have closed the deal contemplated by the LOI.

Further, none of the evidence in the record indicates DiRenzo and Cohen acted outside of the scope of their authority. Davenport has provided insufficient evidence

¹⁰⁹ Pl. OB at 35.

¹¹⁰ *West v. Access Control Related Enters., LLC*, 2019 WL 2385863, at *5 (Del. Super. June 5, 2019).

¹¹¹ *Id.*

DiRenzo and Cohen acted in service of their own self-interests instead of the interests of Toro. As described in addressing Davenport's breach of contract claim, the record indicates Defendants, including DiRenzo and Cohen *wanted* Davenport in the deal contemplated by the LOI, since they tried to resolve Davenport's concerns with the deal, but *Davenport* stalled too long and pushed negotiations to an impasse. The Court does not find Davenport proved tortious interference by a preponderance of the evidence.

C. Defendants' Counterclaims

1. Defendants' claim for the \$100,000 Due Diligence Deposit succeeds.

Defendants contend, pursuant to Section 8 of the LOI, Defendants are entitled to the return of their \$100,000 Due Diligence Deposit because the LOI was terminated and Davenport did not show it spent the funds. Davenport contends the Due Diligence Deposit is forfeited, since Defendants breached the LOI by terminating.

Section 8 of the LOI provides:

[Defendants] shall be responsible for all of [Davenport's] out-of-pocket costs incurred with performing due diligence and legal review with respect to the Property and the [Defendants] and counsel fees incurred in preparing transaction documentation (collectively, "Due Diligence & Legal Costs")....The Due Diligence & Legal Deposit shall be non-refundable except that, if this letter is terminated, Davenport shall

refund any portion of the Due Diligence & Legal Deposit not actually needed to pay costs paid or incurred prior to such termination.¹¹²

The provision, on its face, does not specify whether it applies if Davenport terminates the LOI, if Defendants terminate the LOI, or in both cases.

As discussed above, Defendants terminated the LOI. The termination of the LOI did not constitute a breach of any provision, but the subsequent closing of the acquisition of the Properties without Davenport's investment *did* constitute a breach of the Exclusivity Provision. Accordingly, Davenport's prior material breach argument fails: the termination itself was not the breach. Instead, the subsequent closing of the deal without Davenport was a breach, but Davenport's obligation to repay the Due Diligence Deposit had already ripened as soon as Defendants closed the deal.

To show the difference resulting from the distinction between the termination and subsequent closing more clearly, the Court identifies a hypothetical: if Defendants terminated the LOI and decided *not* to acquire the Properties *at all*, they would not be in breach of the Exclusivity Provision. The Exclusivity Provision only entitles Davenport to invest provided Defendants close on the Properties (which they did), since the Exclusivity Provision provides Defendants may not negotiate or commit to a deal for the acquisition of the Properties which reduces or eliminates

¹¹² PX 1 § 8.

Davenport's investment.¹¹³ The Exclusivity Provision does not itself contain anti-termination language which prevents Defendants from walking away from the acquisition of the Properties altogether. Thus, the termination itself is not the breach of Section 7; the subsequent negotiation and closing is the breach.

Further, as discussed above, the LOI does not itself oblige the Parties to close the deal. The LOI explicitly disclaims any binding effect for the economic terms of the transaction,¹¹⁴ and contains no language obliging the Parties to reach a final resolution. Instead, the LOI references the possibility it may be terminated in Section 8 and does not cabin this power with one party, indicating the Parties' intent the LOI could be terminated. The Court already determined Defendants' termination was not in bad faith. Defendants' decision to terminate is not itself wrongful.

Because Defendants' termination itself did not constitute a breach, Defendants may be entitled to the return of their deposit, provided Davenport did not spend it. The evidence presented at trial did not demonstrate Davenport spent any out-of-pocket funds on due diligence. Davenport introduced no evidence showing how much money was spent, such as legal bills, or other expense reports. John Quinn, being explicitly questioned about the repayment obligation of Section 8, was asked

¹¹³ *Id.* § 7.

¹¹⁴ *Id.* § 10.

if he had any evidence of out-of-pocket costs incurred by Davenport.¹¹⁵ John Quinn answered that he did not.¹¹⁶

The evidence presented at trial indicates Davenport was not spending money on legal fees, since it had paused efforts to draft the Joint Venture Agreement pending resolution of certain inquiries directed to Defendants.¹¹⁷ The absence of bills presented in evidence is thus consistent with Davenport's halting on this work to close the deal.

Based on the above, the Court finds, by a preponderance of the evidence, Davenport breached the LOI by failing to return the Due Diligence Deposit, and Defendants are entitled to its return.

2. Defendants' claim for abuse of process fails.

Defendants contend Davenport is abusing the legal system in bringing the instant action.¹¹⁸ Specifically, Defendants allege Davenport's attempt to seek a preliminary injunction against Defendants constitutes abuse of process, since it was unfounded and resulted in Defendants' loss of a loan offer made in connection with the acquisition of the Properties.¹¹⁹

¹¹⁵ Tr. 10/27 at 243:6-17.

¹¹⁶ *Id.* at 243:18.

¹¹⁷ *Id.* at 116:7-117:19.

¹¹⁸ Def. OB at 44.

¹¹⁹ *Id.* at 45.

Delaware law imposes liability for abuse of process where the plaintiff proves (1) an ulterior purpose and (2) a willful use of process that is improper in the regular conduct of the proceedings.¹²⁰

The Court need not wade deeply into this claim. While Davenport's motion for a preliminary injunction failed, the Vice Chancellor did not declare it to be frivolous or abusive, instead finding a colorable claim but denying the motion because post-trial relief was available.¹²¹ The Court is unpersuaded Davenport did not have a proper basis to *seek* specific performance and get into the acquisition deal, particularly where the Court here finds Defendants breached the LOI in closing the acquisition without Davenport. A losing a motion does not itself constitute an improper one. While Davenport failed on its motion for a preliminary injunction, and here fails to prove damages for breach, the Court is not persuaded the preponderance of the evidence indicates Davenport pursued the injunction improperly.

As articulated above, Defendants' abuse of process counterclaim fails, but its counterclaim for return of the Due Diligence Deposit succeeds.¹²²

¹²⁰ *BRP Hold Ox, LLC v. Chilian*, 2018 WL 5734648, at *6 (Del. Super. Oct. 31, 2018) (quoting *Nix v. Sawyer*, 466 A.2d 407, 412 (Del. Super. 1983)).

¹²¹ D.I. 30 Ex. M at 12:6-8.

¹²² Defendants did not raise other counterclaims in their post-trial briefing, waiving any further arguments. *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) ("The failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim" (internal citation and footnote omitted)); see also *Emerald P's v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived." (citing *Murphy*, 632 A.2d at 1152)).

CONCLUSION

The Court finds as follows:

1. Davenport proved, by a preponderance of the evidence, Defendants breached the LOI but failed to prove any damages for this claim.
2. Defendants proved, by a preponderance of the evidence, Davenport breached the LOI by failing to return the Due Diligence Deposit.
3. Defendants failed to prove, by a preponderance of the evidence, Davenport abused the legal process in bringing its motion for a preliminary injunction in the Court of Chancery.

If there are any open issues not addressed or mooted by this post-trial opinion, the Parties shall notify the Court by letter within five days. Otherwise, the Parties should prepare briefing on the issues surrounding attorneys' fees and interest pursuant to LOI Section 9.¹²³

IT IS SO ORDERED.

/s/ Meghan A. Adams

Meghan A. Adams, Judge

¹²³ PX 1 § 9.