IN THE SUPREME COURT OF THE STATE OF DELAWARE

PHARMATHENE, INC.	§	
	§	PUBLIC VERSION
Plaintiff Below,	§	No. 314, 2012
Appellee/ Cross Appellant,	§	
	§	
v.	§	On appeal from the Court of
	§	Chancery of the State of
SIGA TECHNOLOGIES, INC.,	§	Delaware
	§	C.A. No. 2627-VCP
Defendant Below,	§	
Appellant/ Cross Appellee.	§	

CORRECTED APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDING

In early 2006, SIGA Technologies, Inc. ("SIGA") and PharmAthene, Inc. ("PharmAthene") negotiated and finalized an exclusive license agreement term sheet ("LATS") for ST-246, an early stage smallpox antiviral drug candidate then being developed by SIGA. The parties' understanding was that if their planned merger did not close, PharmAthene would obtain an exclusive license in accordance with the terms of the LATS. The Merger Agreement contained a provision stating that if the merger fell through the parties would "negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the [LATS]" and a Bridge Loan Agreement had a similar provision. (B615 § 12.3; B476 § 2.3)[1]

When the merger did not occur by the deadline, SIGA terminated the Merger Agreement. By this time, and thanks in no small measure to the timely financial aid and operational assistance given by PharmAthene, it now appeared that ST-246 would be a tremendous success. Rather than honor its license commitment, SIGA refused to grant the license or even to negotiate in good faith, insisting on economic terms for the license significantly more onerous to PharmAthene than those in the LATS, leading to this action. PharmAthene's amended complaint included various claims arising out of SIGA's refusal to grant the license. Following a bench trial, the Court of Chancery rejected PharmAthene's claim that the LATS was a binding license agreement, but did find that SIGA breached its contractual obligations to negotiate in good faith and also that SIGA was liable under the doctrine of promissory estoppel. As a remedy, the Court of Chancery created a constructive trust and equitable lien giving PharmAthene a share of profits SIGA realized from the sale of ST-246. In addition, the court awarded PharmAthene a portion of its attorneys' fees and expenses. The Court of Chancery did not award relief on PharmAthene's unjust enrichment claim because it found that any relief on that claim would not lead to different or additional relief to that already awarded on the breach of contract and promissory estoppel claims.

SIGA has appealed from the Court of Chancery's judgment insofar as it awarded relief to PharmAthene, as well as certain other orders and rulings. PharmAthene has cross-appealed, contending that if the decision below is not upheld then PharmAthene respectfully submits that this Court may hold that the terms of the LATS created a binding obligation and that PharmAthene was entitled to specific performance compelling the issuance of a license on those terms. Alternatively, PharmAthene respectfully submits that it can be awarded its expectancy damages. Finally, if this Court does not find that PharmAthene is entitled to any of the foregoing remedies or to an income stream giving it the economic equivalent of the LATS, PharmAthene respectfully submits that is entitled to recover under the doctrine of unjust enrichment.

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1 Unless otherwise indicated, references are to PharmAthene's Appendix B and the specific page number, such as "B ____." References to Exhibits A through F are to the various opinions and orders in the Court of Chancery which have been filed by the Appellant as Exhibits concurrently with the Appellant's Opening Brief. Ex. C, for example, is the Court of Chancery's September 22, 2011 decision after the trial of this case.

SUMMARY OF ARGUMENT

Response to SIGA

1. The Court of Chancery erred in holding that SIGA failed to negotiate in good faith merely by adopting an initial negotiating posture that differed substantially from the terms contained in an earlier term sheet that the Court of Chancery correctly found was non-binding.

PharmAthene's response: Denied.

2. The Court of Chancery erred in holding that SIGA was enriched by PharmAthene's assistance and that PharmAthene is consequently entitled to relief under the doctrine of promissory estoppel where enforceable and fully integrated contracts between the parties govern the subject matter of the alleged obligations.

PharmAthene's response: Denied.

3. The Court of Chancery erred in awarding unprecedented relief that is not supported by law and that is inequitable given PharmAthene's *de minimis* costs in contributing to the parties' would be collaboration.

PharmAthene's response: Denied.

4. The Court of Chancery erred in awarding PharmAthene a portion of its attorneys' fees, expenses, and expert witness costs.

PharmAthene's response: Denied.

PharmAthene's Arguments

1. If this Court does not affirm the Court of Chancery's judgment, a payment stream based on the economic terms of the LATS is appropriate.

2. Alternatively, if this Court does not affirm the Court of Chancery's judgment, it is respectfully submitted that PharmAthene is entitled to specific performance granting it a license for ST-246 in accordance with the terms of the LATS.

3. Alternatively, if this Court does not affirm the Court of Chancery's judgment, PharmAthene is entitled to its expectation damages.

4. If this Court finds PharmAthene is not entitled to any of the above relief, PharmAthene is entitled to recover under the doctrine of unjust enrichment.

STATEMENT OF FACTS

> [T]his is not a situation where two parties simply failed to come to terms on a prospective transaction. Rather, it is one where SIGA, in bad faith, torpedoed the negotiations that it had agreed to conduct.... I find that SIGA breached its contractual obligations and engaged in a glaringly "egregious instance[] of overreaching".... (Ex. C, at *34, *44)

Overview

This is a case about bad faith coupled with "seller's remorse" -- plain and simple. (*See* Ex. C, at *24) At the end of 2005, SIGA was out of cash and out of options. SIGA's only viable program, a potential smallpox treatment, ST-246, was stalled; SIGA lacked both the money and personnel resources to move it forward; there was no guarantee that ST-246 would ever be commercially successful; and NASDAQ had threatened to delist SIGA's shares. (Ex. C, at *2) SIGA's largest stockholder, MacAndrews & Forbes ("M&F"), a company owned by Ronald Perelman, had made it clear through Donald Drapkin ("Drapkin"), M&F's Vice Chairman and Chairman of SIGA's board, that M&F was unwilling to invest any more money in SIGA. (Ex. C, at *2, *25; *see also* B3253, (Drapkin); B3266-67 (Konatich)) Against this backdrop, SIGA turned to PharmAthene, with which two years earlier SIGA had considered a merger. (Ex. C, at *3)

As Dennis Hruby ("Hruby"), SIGA's Chief Science Officer noted in an email at the time, SIGA was desperate to do a deal with PharmAthene: "the terrifying thing is if the deal falls through and we are back to no $$...and a pissed off Donny [Drapkin]." (B1812-13; *see also* B1805) PharmAthene was not interested in providing financial or operational support to SIGA, however, unless PharmAthene was guaranteed that it would ultimately control ST-246, either by a merger or an exclusive license. (Ex. C, at *6) Given the parties' past unsuccessful merger discussions and SIGA's immediate need for cash, SIGA insisted that the parties agree on a license first, before discussing a merger. (Ex. C, at *3) This led to extensive license negotiations in January 2006 at the very highest levels of both companies. (Ex. C, at *3, *5) These negotiations, directed on SIGA's end by Drapkin, culminated in the LATS (B20-22). (Ex. C, at *5) The Court of Chancery found that the LATS contained all the material economic terms of the license arrangement. (Ex. C, at *19)

Once the LATS was completed, the parties turned to discussing a merger. Because SIGA was in need of immediate cash, PharmAthene agreed to provide it with a $3 million bridge loan pending the outcome of the merger discussions. (Ex. C, at *6) This led to the signing, on March 20, 2006, of a Bridge Loan Agreement. (Ex. C, at *7; B469) PharmAthene was not interested in merely being a banker to SIGA, and was willing to make the loan only because it had been promised that, at the end of the day it would control ST-246, either through a merger or with a license with the terms of the LATS if no merger occurred. (Ex. C, at *6)

PharmAthene's willingness to make the bridge loan was based on a promise made by Drapkin during a February 22, 2006 meeting before the Bridge Loan Agreement was signed.

At that meeting, PharmAthene asked that the terms of the LATS now be embodied in a formal license agreement to be executed at the same time as the Bridge Loan Agreement. (Ex. C, at *6) Drapkin told PharmAthene's representatives that he did not want to pay lawyers to put the LATS into final form, and that PharmAthene would be protected if they attached the LATS to the Bridge Loan Agreement. (*Id.*) Drapkin assured PharmAthene that "this approach would be as good as a license agreement and would guarantee PharmAthene, at a minimum, a license if negotiations for a merger fell through." (*Id.*; B3227 (Baumel)) Drapkin reiterated this promise at a second meeting on March 6, 2006. PharmAthene took Drapkin at his word, and the Bridge Loan Agreement contained a provision stating that if the parties failed to merge "SIGA and PharmAthene will negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the [LATS]...." (B476 § 2.3)

On June 8, 2006, the parties executed a Merger Agreement that contained essentially the same language as the Bridge Loan Agreement requiring SIGA, in the event there was no merger, to negotiate in good faith with the intention of executing the definitive License Agreement in accordance with the terms of the LATS. (B615 § 12.3) PharmAthene also provided valuable assistance to SIGA in regulatory matters, quality assurance and control and government affairs, and assisted SIGA, to varying degrees, with several events critical to the drug's development." (Ex. C, at *8, *27, n. 144) ("expertise and services [provided by PharmAthene] were valuable")

Thanks in large part to PharmAthene's financial and operational assistance, by September 2006 SIGA was able to achieve a key human clinical trial test result and an animal test result and obtain $16.5 million in new funding from the National Institutes of Health. (Ex. C, at *8) When the merger negotiations were called off at that time, "the tables had turned" and SIGA now believed it had sufficient capital to go it alone. (Ex. C, at *25) Recognizing that it had a clear obligation to negotiate the terms of the license agreement, SIGA knew that it could not just walk away from PharmAthene. Instead, SIGA simply decided to go through the motions of negotiating the final license terms, knowing full well that its proposals were so unreasonable and far from the previously agreed terms in the LATS that it was certain no license would result.

After 11 days of trial, the Court of Chancery in its decision repeatedly found that "SIGA acted in bad faith" in the negotiations (Ex. C, at *24) and deliberately "torpedoed" them. (Ex. C, at *34) SIGA's proposals "reflect[ed] a complete disregard for the economic terms of the LATS" (Ex. C, at *24); "[v]irtually every term of [SIGA's proposal] was more favorable to SIGA than the corresponding provision in the LATS" (Ex. C, at *21); and "SIGA also revised the noneconomic terms of the relationship to favor itself significantly" (Ex. C, at *21). The Court of Chancery found that PharmAthene had shown that SIGA's

conduct met the standard of bad faith in Delaware, which is "the conscious doing of a wrong because of dishonest purpose or moral obliquity...." (Ex. C, at *22)[2]

As a remedy, the Court of Chancery awarded equitable relief in the nature of a constructive trust effectively giving PharmAthene an equitable lien on a portion of the potential proceeds from the marketing by SIGA of ST-246. (Ex. C, at *42) In doing so, the Court of Chancery did not, as SIGA asserts, make a new contract for the parties. Rather, the court stated that its constructive trust relief was "not 'to effectuate the presumed intent of the parties, but to redress a wrong,' and, in this way, '[i]t is an equitable remedy of great flexibility and generality....'" (Ex. C, at *34)

Background Facts

SIGA only reviews in a conclusory way the course of negotiations leading up to the LATS and the Bridge Loan and Merger Agreements. Thus the Court of Chancery's factual findings described below concerning these negotiations are largely unchallenged.[3]

SIGA's Predicament And Its Approach To PharmAthene

In 2004, SIGA acquired ST-246 and a library of molecules from Viropharma Inc. for $1 million and one million shares of SIGA stock. (Ex. C, at *2) ST-246 was potentially an orally administered antiviral drug for the treatment of smallpox. (*Id.*) At that time, the viability of ST-246, its potential uses, safety, and efficacy, and the possibility of its obtaining government approvals and being the subject of government supply contracts were all unknown. (*Id.*) The possibility existed, however, that with the help of cash, marketing, and technical knowledge, ST-246 might become an important weapon against smallpox and, therefore, extremely valuable. (*Id.*) There was also the possibility that any money or effort invested in ST-246 would be for naught. (*Id.*)

By the end of 2005, SIGA had invested approximately $500,000 to develop ST-246 since acquiring it. (Ex. C, at *2) However, SIGA was running out of money fast. ST-246, its only potentially valuable asset, was "treading water" (B1799-1801) and it lacked the internal expertise to move it forward. Drapkin had "categorically" decided that M&F would not put any more money into SIGA. (Ex. C, at *25; B3253 (Drapkin); B3266; B3267 (Konatich))

At the time, SIGA estimated that it would take an additional $16 million to complete the development process. (Ex. C, at *2) Raising the $16 million would mean significant

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2 The Court stated no less than 17 times that SIGA's actions were taken in bad faith and/or not in good faith. (*See* Ex. D, at *3, *4, *6, and Ex. C, at *22, *24, *26, n.140, *34, *35, *37, *38, *39, *41 and *44)

3 SIGA says it is presenting "the facts necessary to this appeal, as found by the Court of Chancery, except when otherwise noted." (SIGA Br. at 4) Nothing could be further from the truth. If SIGA's factual presentation is compared side by side to the Court of Chancery's findings they describe two very different cases. For instance, SIGA claims the LATS was not finalized. The Court of Chancery clearly found otherwise. (Ex. C, at *5)

dilution to the existing shareholders of more than 50%. (B3267 (Konatich)) Furthermore, NASDAQ had threatened to de-list SIGA's shares in August 2005, and its stock price had fallen below $1 per share. (Ex. C, at *2; B3267-68 (Konatich)) SIGA also had never taken a drug to market and lacked infrastructure necessary to do so, including employees with experience in areas such as regulatory or government affairs, quality assurance, quality control, clinical trials, manufacturing and business development. (Ex. C, at *2; B3200 (Richman); B3268 (Konatich); B3283 (Hruby); B3233 (Morges); B3251-52 (Rose); B1828-29) PharmAthene had all of this expertise. (Ex. C, at *27; B3188 (Wright); B3200 (Richman), B1828-29)

It was against this backdrop that in December 2005 Thomas Konatich ("Konatich"), SIGA's CFO and later its acting CEO, contacted Eric Richman ("Richman"), PharmAthene's Vice President of Business Development, about a collaboration to continue the development of ST-246. (Ex. C, at *14) In late 2003, PharmAthene and SIGA had been in merger discussions which had reached an advanced stage, but PharmAthene's board had decided to terminate those negotiations. (Ex. C, at *3; B3198 (Richman)) In response to Konatich's overture, Richman suggested a merger. Konatich said no "[b]ecause SIGA was quickly running out of cash," (Ex. C, *14), and because of the previous failed merger attempt. (Ex. C, at *3) SIGA insisted that the parties first agree on a license, "which would get SIGA the funds it needed faster than a merger would." (Ex. C, at *14; B3262, B3269 (Konatich); B3202; B3204 (Richman)) Only after agreeing to the terms of a license would SIGA consider a merger. (Ex. C, at *3; B2571-79; B3201(Richman))

Extensive Negotiations Leading to Agreement on the LATS

Both companies put together high level teams to negotiate the license agreement and after hard bargaining the parties agreed on all the essential terms of the LATS. (Ex. C, at *19, *26) Working on the deal for SIGA were Konatich, Drapkin, Hruby, Michael Borofsky ("Borofsky"), a lawyer at M&F, and Paul Savas ("Sevas"), a board member of SIGA and CFO of M&F. (Ex. C, at *3) Drapkin testified that Borofsky was "an extraordinary good lawyer." (B3259-60; B3670 (Drapkin))

Between January 3, 2006 and January 26, 2006 the parties engaged in extensive negotiations over the LATS. (Ex. C, at *3-5) Such negotiation involved the exchange of not less than four drafts of the LATS and numerous emails between the parties and internally among themselves.[4] On January 3, 2006, Richman sent a proposed license agreement term sheet to Konatich and Hruby. (B1762-64) The terms were based on discussions Richman had with Konatich and Hruby. (B3202 (Richman); Ex. C, at *3)) Upon receipt, Hruby emailed Konatich stating "Overall not a bad offer...." (B1755)

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4 (B1, B5, B8, B11, B14, B17, B23, B821, B844, B1739, B1751, B1753, B1755, B1756, B1760, B1762, B1765, B1767, B1768, B1773, B1777, B1778, B1780, B1785, B1789, B1792, B1794, B1797, B1824, B1875, B1890, B1908, B1909, B1919, B1921, B1924, B3171, B3173, B3176; *see also* B3272 (Konatich))

On January 4, Konatich sent the proposal to SIGA's controller Ayelet Dugary ("Dugary") for her review (B1762-64), and Hruby sent a detailed response to Richman, copied to Konatich, stating, "Thanks for the prompt response. We are most interested in trying to make this a mutually agreeable term sheet and moving on to the next step." (B1765; Ex. C, at *3) That same day, Konatich responded to Hruby by email saying "My major problem is with the $2.0 [million] up front. I would like to have at least $3 [million] in cash which would permit the completion of the build out and get us through 2006 without to much trouble...." (B1760, at 1; Ex. C, at *3; B3270 (Konatich)) Richman reported that PharmAthene's Board was "very supportive." (Ex. C, at *4) Drapkin's internal response: "great push hard on cash and guarantees." (Ex. C, at *4) Later that day, Hruby sent an email to Konatich commenting on possible milestone payments. (B1760)

On January 5, Richman forwarded Hruby's comments on the proposal to CFO Kaiser, CEO Wright, CSO Langermann, and Jones. (B821-22)

On January 6, Richman emailed the PharmAthene team a revised license agreement term sheet. (Ex. C, at *4) His cover email stated: "I've revised the term sheet to accommodate as many of Dennis' [Hruby's] comments as possible. I have also increased up front and total milestones [and] the Products are defined broadly in the event that 246 dies and we need a back up -- we can go to the family it was generated from and get a new compound." (B3173) That same day Hruby emailed Richman more information on the status of ST-246. (B1773) On January 9, Konatich emailed Richman asking if a proposed scientific review meeting on ST-246 would delay a revised draft term sheet. (B1785) Richman responded, saying he was "working on getting it out to you today." (B1919) Konatich in turn forwarded Richman's email to Drapkin saying:

> Below are a couple of emails that have been sent around between the parties. I was concerned that the [scientific] meeting might delay a Term Sheet; but as you can see from the note below that he is still trying to get us something today. As soon as I have something I will forward it. (B1919)

As promised, Richman sent a revised term sheet the same day accommodating many of Konatich's comments. (B1785; B3272 (Konatich)) Konatich forwarded the draft term sheet to Drapkin and to the "group," Savas, Borofsky, Hruby and Dugary. (B1921) Konatich responded to Richman:

> Thanks. I have circulated the Sheet to the **Board members who are involved in this project for their review**. I fear the front end is likely to still be an issue on our end. Receiving stock in a private company doesn't help us much. As soon as I hear something from our people I will be in contact with you. (B1780, at 3)(emphasis added)

Those board members were Drapkin and Savas. (B3272 (Konatich)) That same day, Hruby commented on the term sheet to Konatich: "we shouldn't lose sight of the fact that they are committing to fund all development costs, which is probably worth $10-20M, and they are committing to fund product related research at SIGA which might alleviate some burn and free up $$." (B1780) Konatich responded: "I agree that there is possibly more here than

meets the eye. If we can get hard cash up another million or so it might be worth it ...." (B1780)

On January 10, Konatich emailed Hruby stating: "If the five million could be 'guaranteed' payments (over the next 12 months) I think Donny [Drapkin] would do it in a minute and I probably would too." (B1789; B3273; B3671 (Konatich)). Hruby responded stating: "every day keeps ST246 product development moving at a snails pace and undo's [sic] all the good stuff we accomplished last year." (B1789; B3273 (Konatich))

At the scientific review meeting at Bear Sterns several days later, Konatich and Richman had further discussions about the terms of the license agreement term sheet. (B3271-72 (Konatich); *see also* B1778; B3284 (Hruby))

On January 16, Richman sent Konatich a third revised license agreement term sheet. (B14) Konatich responded:

> I am sending this on to Dennis [Hruby] to review before I send it to Don [Drapkin] and the folks at M&F. I will speak to him as early as possible in the morning. I [sic] sure we can respond well before your meeting on Thursday. (B1792)

Konatich then forwarded the revised term sheet to Drapkin as well as M&F CFO Savas, M&F lawyer Borofsky, Dugary and Hruby. In the forwarding email he told Drapkin:

> Attached is a new 'Term Sheet' that came in last evening from Eric [Richman]. They have taken their stock off the table and structured the up front payment of $6 MM over one year.... They have a board meeting on Wednesday and would like to know whether or not there is a chance we can work something out. I suggest, given their timeline, you speak to Eric and present the Board's position and either keep going or walk away. (B1794)

On January 17 Drapkin called Richman, as to which Richman testified that:

> Mr. Drapkin, basically said he had the term sheet in front of him and that -- he said it was ready to go. He thanked Tom and I for all of our efforts, but that he wanted to see two changes inserted into the term sheet. And I had it up on my screen, and he told me what the changes were. And I actually typed them into the document that I had on the screen. And he said to me, "**If you get these changes and these changes are okay, we are good to go. We have got a deal on the term sheet, and it's ready to present to your board for approval.**" (B3205-06 (Richman), B3187 (Wright)(Emphasis supplied)[5]

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5 B17 shows the Drapkin changes that Richman added to JTX9 (B14), the January 16 license term sheet, and B20 shows the final LATS with the Drapkin changes. (B3206-07 (Richman)) The two changes Drapkin wanted were (1) a 50/50 profit split on U.S. Government sales where net margins are over 20% and (2) an increase of $250,000 to one milestone and a corresponding decrease to a different milestone.

While Drapkin denied that the call took place, the Court of Chancery found that it did. (Ex. C, at *4)

At a January 18 PharmAthene board meeting, Richman went over the January 16 term sheet with the directors and explained the changes Drapkin proposed. (Ex. C, at *5) On January 19, Richman spoke with Drapkin again and told him "that the board had approved the term sheet with his changes"; the license agreement term sheet was now finished and the parties had a "deal." (B3206-07 (Richman)) On January 26, a clean copy was made of the LATS which incorporated Drapkin's two changes. (Ex. C, at *5; B3207-08 (Richman))

Overview Of The Terms Of The LATS

Among other things, the LATS contemplates an exclusive license agreement along the following lines to support the further development and commercialization of ST-246 for the treatment of smallpox. (Ex. C, at *5)(citing JTX 4) First, SIGA would grant to PharmAthene "a worldwide exclusive license and [sic] under the Patents, Know-How and Materials to use, develop, make, have made, sell, export and import Products in Field. The right to grant sublicenses shall be specifically included in the license." (*Id.*) Second, the license would cover ST-246 and all other related products worldwide covered by the patents and know-how relating to ST-246 and its development and manufacture. (*Id.*) Third, the LATS described the makeup of a research and development committee, which would include representatives from both PharmAthene and SIGA. (*Id.*) The parties identified twelve categories of tasks relevant to that committee and assigned responsibility for each one to either SIGA or PharmAthene. (*Id.*) In addition, PharmAthene agreed to fund the research and development based on a defined budget. (*Id.*) Fourth, the LATS included detailed economic terms set forth below on page 16 *infra*.

Preliminary Merger Discussions; SIGA's Bridge Loan Request

During Richman's January 19 call with Drapkin, Richman raised the issue of a merger: "we knew that we were eventually going to get to a merger discussion. Now that we have completed the license agreement term sheet and I told him that our board had approved it and I did what he asked me to do, which was to get it approved, that we could now talk about a merger." (B3207 (Richman)) They agreed to meet. (B3208-09 (Richman))

Representatives of PharmAthene and SIGA met on January 23, 2006, at Drapkin's office in M&F's headquarters in New York City, which M&F refers to as the "Townhouse" and decided to proceed with merger discussions. (Ex. C, at *6) Because of SIGA's precarious financial position, however, SIGA asked PharmAthene to provide bridge financing to allow SIGA to continue developing ST-246 while merger negotiations proceeded. (*Id.*) PharmAthene did not have the money to make the loan, but agreed to consider raising the required funds on the condition that PharmAthene would at least get a license consistent with the LATS for ST-246. (*Id.*; B3212-13 (Richman)) As PharmAthene CEO Wright testified:

> [W]e would do a bridge loan if ... it was guaranteed that we either received a license...under the terms that had already been negotiated and agreed to by both parties, or the merger went through. (B3189 (Wright))

Consistent with PharmAthene's insistence that it would ultimately control ST-246, on February 10 Wright sent to Drapkin a draft merger term sheet for the merger of PharmAthene and SIGA that provided: "The License Agreement will be executed simultaneously with the Definitive [Merger] Agreement and will become effective only upon the termination of the Definitive Agreement." (Ex. C, at *6; B1806-10)

On February 22, the parties met once again. Drapkin told the PharmAthene contingent that he was not going to pay lawyers to draft a formal license agreement. (*Id.*; B3227-28 (Baumel); B3210-11 (Richman); B3190 (Wright)) Instead, Drapkin told them that they should attach the LATS to the Bridge Loan Agreement and that would be as good as a license agreement and would guarantee that PharmAthene would get a license for ST-246 on the terms of the LATS.

PharmAthene outside corporate counsel Jeffry Baumel ("Baumel") testified that:

> Drapkin's response was, "Attach the term sheet. It's final. And tell your board that that is as good as an executed license agreement. If the deal doesn't close, we can negotiate a definitive agreement in accordance with those terms and you'll have the license." (B3227 (Baumel); Ex. C, at *6)

Richman added that:

> And he [Drapkin] was very, very clear about it, that it's our product, one way or the other.... I remember he looked at Dave [Wright] and he guaranteed him he was going to have the product one way or the other, either through the merger or through the license. (B3211 (Richman))

And Wright testified:

> At one point in this meeting he [Drapkin] even instructed Jeff Baumel to put language into the term sheet that would say if the merger didn't happen, then we would get a license based upon the terms that had already been agreed to.... We had an agreed-to term sheet that was as good as a license agreement, so that we didn't need to go forward and finish putting all the boiler plate to the terms that we currently had. (B3190-91 (Wright); Ex. C, a *6-7)

On March 1, PharmAthene's board of directors reviewed and approved the terms of the bridge financing to SIGA and a merger letter of intent ("LOI"), which had attached the merger term sheet that included the LATS. (Ex. C, at *7; B445; B3191 (Wright)) Like the non-binding agreements to agree in the cases SIGA cites, the Merger LOI (unlike the clearly binding Bridge Loan and Merger Agreements) specifically states:

> This letter is an indication of our intent to consummate the Transaction and is not an offer to complete a merger ... any offer by us will be subject to the negotiation and execution of a definitive agreement ... and to the completion of

> a mutual due diligence investigation by each of the parties.... Other than matters covered by the sections entitled "Fiduciary Duty," "Expenses" and "Exclusivity," this term sheet is non-binding and only an expression of interest and is subject in its entirety to the negotiation and execution of a definitive Merger Agreement. (B454)

This language clearly demonstrates that the parties knew how to make it abundantly clear when they did not intend to be bound.

At another meeting of the parties on March 6, Drapkin reiterated that "in any case, if the merger doesn't close, [PharmAthene] will get their license." (Ex. C, at *7; B3229 (Baumel); B3213 (Richman); B3191-92 (Wright))

The Bridge Loan Agreement And Loan

On March 20, SIGA and PharmAthene entered into the Bridge Loan Agreement (B469) pursuant to which PharmAthene provided SIGA $3 million. As suggested by Drapkin, the LATS was attached to the Bridge Loan Agreement. (Ex. C, at *7; B476, Ex. C) The Bridge Loan Agreement provided that if there was no merger, then the $3 million was to be credited to the upfront and other amounts due from PharmAthene under the definitive license agreement to be negotiated. (B495-99, [8% note] attached as Ex. A)

PharmAthene board member Czerepak and its CEO Wright both testified that the only reason that PharmAthene was willing to make the bridge loan was because they had been promised by Drapkin that if there was no merger PharmAthene would have the license in accordance with the terms previously negotiated. (B3663; B3189 (Wright)) This was the approach the parties agreed to in § 2.3 of the Bridge Loan Agreement and upon which PharmAthene provided crucial funding to SIGA. (B3193 (Wright); B3214-15 (Richman))

The trial court specifically found that PharmAthene would not have loaned $3 million to SIGA without this assurance from SIGA (Ex. C, at *23)

The Court of Chancery further found that:

> [T]he parties focused their energies between February and June 2006 on negotiating the terms of the Bridge Loan Agreement, effectuating the Bridge Loan, and negotiating the Merger Agreement with the **understanding that if no merger occurred, they would negotiate a fallback licensing agreement in accordance with the basic economics of the LATS.** (Ex. C, at *23)(emphasis added)

PharmAthene Provides "Valuable" Assistance To SIGA

In March 2006, the parties began to integrate operations. (Ex. C, at *8) PharmAthene started to provide operational assistance to SIGA in areas such as regulatory activities, quality assurance, quality control, and governmental affairs to help develop ST-246. (*Id.*) Throughout the next several months, during which "it was still highly speculative whether ST-246 would prove valuable," (Ex. C, at *24), PharmAthene assisted SIGA with several events critical to the drug's development. (Ex. C, at *8) For example, SIGA's Audit

Committee approved an agreement with a clinical trial organization to perform the first human test of ST-246 for $600,000. (*Id.*) SIGA likely paid for that service with proceeds from the bridge loan. (*Id.*) Similarly, PharmAthene representatives were present and answered questions during a reverse site visit between SIGA and NIH in July. (*Id.*) Soon thereafter, in September 2006, the NIH awarded SIGA $16.5 million for the development of ST-246. (*Id.*) As the Court found: "the expertise and services [provided by PharmAthene] were valuable...." (Ex. C, at *27, n. 144) "PharmAthene assisted SIGA to varying degrees, with several events critical to the drug's development." (Ex. C, at *8; *see also id.*, at n. 60 (finding that PharmAthene's support "contributed to the success of ST-246 in 2006"))

The June 8, 2006 Merger Agreement

On June 8, 2006, PharmAthene and SIGA signed the Merger Agreement. (B541-704) PharmAthene started working with SIGA to consummate the merger. (B3231 (Baumel); B3218 (Richman)) Sections 12.3 and 13.3 of that Agreement provide that, if the merger were terminated, the parties would use best efforts to "negotiate in good faith with the intention of executing a definitive license agreement in accordance with the terms set forth in the [LATS]...." Drapkin insisted that the Merger Agreement have an aggressive drop-dead date of September 30, 2006. (Ex. C, at *8) Drapkin said "if we need extensions [SIGA will] grant them." (*Id.*; B3230; B3665 (Baumel), B3193 (Wright), B3216 (Richman))

Success With ST-246 Leads SIGA To Now Consider Going It Alone Without PharmAthene

On June 9, Hruby was notified of a $5.4 million funding award from NIAID. (B1818-19) He forwarded the news to Konatich. (*Id.*) Konatich responded "it is a damn shame we had to merge." (*Id.*) Hruby responded in turn: "You got that right. I don't think Bernie [Siga's former CEO] is **a 'bad' man in the way of DD [Drapkin]**, although he is pretty slimy beneath the Uncle Bernie routine. Had he not gotten us behind the curve through ineptitude, we would still be an independent company ... **we could have gone all the way ourselves. Instead we got sold into slave labor and if anything the PTHN gang will drag us down**." (*Id.*; B3289 (Hruby)) (emphasis added).

Other positive developments for ST-246 followed. On July 13, SIGA announced "that its lead smallpox candidate, SIGA-246 has successfully completed the first planned human clinical safety trial." (B1820) This was a trial conducted at PharmAthene's request, and paid for with money provided by PharmAthene. (B1811) Hruby described the results as "spectacular." (B3290 (Hruby))

On September 13, Hruby called Richman and told him that he and the government personnel at the CDC where the test was conducted were "very excited" and "beside themselves" about the successful results of ST-246 in a variola (smallpox) challenge conducted in primates. (B1882-83; B3292 (Hruby))

On September 27, Hruby received notice of a $16.5 million contract from the NIH, which he believed was sufficient to fund all remaining ST-246 development. (B1843) That same day, Hruby sent an email to Drapkin and Adnan Mjalli, another member of SIGA's

board. (B1843) The clear purpose of the email was to derail the merger and to confirm to Drapkin and Mjalli that SIGA could now financially go it alone, without PharmAthene. The email started by saying that in the last few months "major" progress had been made on ST-246, with a number of clinical successes and the receipt of government funding of approximately $15 million for ST-246, along with the notice of award for "a 16.5M contract from NIH to fund ST-246 development activities up to and through the NDA filing." (B1843) **"Bottom line is the product's entire development is supported, we have all the necessary partnerships and advocates in place, and have the team in place to see it through. Estimated time to file NDA is Q408."** (*Id.*)(emphasis added)

In his efforts to get SIGA to repudiate its commitment to PharmAthene, Hruby also wrote that: "I have grave concerns about the merger as it is currently going forward in that it appears that the merged company will not be SBIR compliant. In that case we would have to shut down [$]30Million in current grants and contracts...." (B1843) On cross-examination, Hruby admitted that his last statement was false. Only about half of the $30 million involved SBIR funding. Also the SBIR funding for the current year (2006) would not have been lost. (B3293 (Hruby)) Hruby's response to this significant misrepresentation was "It might have been an exaggeration." (B3293 (Hruby))

Subsequently, M&F in-house lawyer Steven Fasman ("Fasman") emailed Hruby telling him: "Here is the decision to be reached: should SIGA continue with its merger plans, or should it try to go it alone?" (B1928; Ex. C, at *9) Conspicuously absent is any mention of SIGA's duty to negotiate a definitive license agreement with PharmAthene.

SIGA Terminates The Merger Discussions

As the September 30 deadline for the merger approached, PharmAthene requested that Drapkin extend the termination date because the SEC had taken longer to approve SIGA's proxy statement than originally expected, and a precondition to PharmAthene raising capital for the merger was an SEC approved proxy statement. (Ex. C, at *9) Contrary to SIGA's assertion, the Court of Chancery did not find that PharmAthene was at fault for the parties not meeting the deadline. (*Id.*) On October 4, SIGA's Board of Directors, including Drapkin, met and after a presentation by Hruby about the status of ST-246, notwithstanding Drapkin's promise to extend the closing date if asked (Ex. C, at *8), decided to terminate the merger. (Ex. C, at *9) No mention is made in the board minutes of SIGA's contractual good faith obligation to negotiate an exclusive license agreement with PharmAthene in accordance with the terms of the LATS. (B1849-72)

SIGA Deliberately Torpedoes The License Negotiations

After SIGA terminated the Merger Agreement, PharmAthene hired attorney Elliot Olstein ("Olstein") to conclude a licensing agreement with SIGA. (Ex. C, at *9) On October 12, PharmAthene's Baumel sent a proposed license agreement (the "Proposed License Agreement") that incorporated the terms of the LATS to SIGA outside counsel James Grayer. (B705) On October 26, Olstein sent an email to Nicholas Coch ("Coch"), another outside lawyer for SIGA, in which he expressed PharmAthene's readiness to sign the Proposed License Agreement because it contained "all essential terms of a license agreement

and is completely consistent with the [LATS]." (B1911) The email also stated that PharmAthene believed a meeting would be more productive if SIGA provided a revised license agreement prior to the meeting. Coch responded that SIGA would not provide a revised license agreement before the parties met, stating that Olstein misunderstood "the nature of the negotiation required under the Merger Agreement" and that what was needed was "a robust discussion." (Ex. C, at *9; B1913) On November 2, Fasman updated SIGA's board, including Drapkin, about the status of the PharmAthene negotiations. (B1915)

Meanwhile, Dugary was directed to prepare a revised analysis of the total "past and future [ST-246] related investments and costs" and its potential market. (B1929-33 and Attach. at 2) The purpose of this request, ultimately, was for Dugary to suggest a revised payment that would support "buy[ing] into a 50% participation in future profits from the product." (*Id.*) On October 18, Dugary emailed Fasman, Borofsky, Savas and Konatich her conclusions: total post and future development costs of ST-246 equaled $39.66 million and, therefore, "an up-front license fee of $40 million" would support a "50/50 deal" in her view.[6] (Ex. C, at *9; B1929-33 and Attach. at 2)

The November 6 meeting. On November 6, the parties met for the first time following termination of the merger. (Ex. C, at *10) PharmAthene was represented by Richman, Baumel and Olstein; SIGA by Fasman, Coch, Konatich and Rose. (B3219 (Richman)) The Court found that Drapkin had deliberately absented himself from the negotiations in that he, "and SIGA for that matter, essentially left the negotiations of the license agreement to those who either had no involvement in the previous negotiations and agreements, most notably Fasman, or acting in their own self-interest, such as Hruby, were more than happy to disregard the economic importance of the LATS." (Ex. C, at *25) As a result, there was no one at the table to put a "brake on Hruby's willingness to cut PharmAthene out...." (*Id.*)[7]

The meeting started with Fasman noting the title of the LATS -- "Siga/PharmAthene partnership" -- and then talking about a partnership, which Richman testified "lost me because we had never discussed partnership before, and this is the first time it's being brought up." (B3220 (Richman); *see also* B3219-20 (Richman); B3298-99 (Fasman)) In

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6 Most of these costs had been paid for by the U.S. government. (B1929-33, Attach. at 2)

7 Before SIGA was able to go it alone, Hruby was enthusiastic about teaming up with PharmAthene. In a February 25 report to Drapkin, Hruby commented that the PharmAthene team was "a really strong group of professionals with strength in many areas of development (clinical, regulatory, manufacturing, etc.). I think they have the ability to facilitate and accelerate the development of ST-246...." (B1828-29) On March 6, he told other SIGA colleagues that "[a]s soon as the term sheet is signed, we should establish a ST-246 project team and coordinate development efforts...." (B1830; Ex. C, at *8)

But as discussed above, once SIGA received the $3 million in financing from PharmAthene that it desperately needed to keep ST-246 above water (B3285-86 (Hruby)), and it became clear that decision making regarding ST-246 would likely shift from Hruby and his research group in Oregon to the PharmAthene team in Maryland, Hruby's tune changed. (*See* B1, B1877, B1880, B1884, B1886)

fact, it is apparent from the relevant documents and interactions of the parties that at no time did they intend the LATS to create a legal partnership between the parties. The parties' clear intent was to enter into a license agreement.[8]

Siga board member Eric Rose ("Rose") talked about all the things that had been accomplished since January 2006, that the product was more valuable and that the terms of the LATS were therefore inappropriate. (B3220 (Richman)) Olstein responded that the parties were bound by the terms of the LATS but to avoid a dispute PharmAthene was willing to consider something different. (*Id.*; B951-52) In response, SIGA suggested that an upfront payment of $40-45 million and a 50/50 profit split would be more appropriate. (B3299 (Fasman))

Fasman also proposed an LLC structure but Olstein questioned the need for an LLC in a licensing transaction. (B3345-47 (Olstein)) It was agreed that SIGA would put something in writing. (Ex. C, at *10)

Richman's testimony about Konatich's only comment at the meeting is telling:

> [Konatich] said something to the effect that PharmAthene basically drafted a term sheet and just e-mailed it to them, and that he had no involvement in it, wasn't familiar with it.... And, frankly, I realized we entered into a completely different realm and these weren't the people that I knew and had worked with in the past and had respected. And I was just flabbergasted by that. (B3221 (Richman))

The November 21 meeting and the LLC Agreement. On November 21, Coch sent to Baumel the 102 page LLC (B712), coming a full 52 days into the 90 day exclusive negotiation period. (Ex. C, at *10) This proposal "reflect[ed] a complete disregard for the economic terms of the LATS," (Ex. C, at *24); "[v]irtually every term of [that proposal] was more favorable to SIGA than the corresponding provision in the LATS." (Ex. C, at *21) "SIGA also revised the noneconomic terms of the relationship to favor itself significantly." (*Id.*) SIGA's internal documents as it drafted the LLC are telling. On November 17, Fasman emailed Drapkin, Savas and others stating in part: "I attach a term sheet setting forth the terms we intend to propose, **in a non-binding fashion and subject to the negotiation of a full contract (so that PharmAthene cannot simply say 'yes')**...." (B1943-50)(emphasis added)

In response to Fasman's term sheet, Rose emailed Fasman, Drapkin, and others on November 18 asking "Am I correct in understanding that the new partnership entity [the LLC] will pay royalties to SIGA **and** SIGA will own half of the LLC?" (B2046-47)(emphasis added) Fasman responded: "Yes, that is the idea. SIGA will get to draw out the value of its half of the LLC first through the upfront, milestone and royalty payments. Any residual value can then get withdrawn through dividends or liquidation of the entity, so that PHTN can 'catch up' if there are sufficient funds available. In no situation, however,

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8 That is what was stated in SIGA's Draft Proxy Statement. (B112, at 45; *see also* B89, at 22 (describing SIGA's obligation to negotiate a definitive license as a "risk factor"))

can SIGA ever be forced to give back money if there are insufficient funds to pay anything, or PHTN's full share, to PHTN. Thus, SIGA will always be sure to get the value of its creation whether or not PHTN sees any value." (B2046-47) Fasman also testified that he came up with SIGA's initial capital account in the LLC being credited with $300 million on a scratch pad in his office because "you have to set the capital account somewhere." (B3305-06 (Fasman))

The economics and business terms of the LLC were completely different from the LATS. What was proposed was not a license agreement (or even a partnership) but an LLC. In summary, the differences between SIGA's wholly one-sided proposal and the LATS are as follows:

	LATS	LLC
Up-front Payment	$6 million[9]	$100 million
Milestone Payment	$10 million	$235 million
Royalty Rates	8%, 10%, 12%	18%, 22%, 25%, 28%
Profit on Sales to U.S. Government	To extent margin on sales to U.S. Government exceed 20%, 50% of profit	To the extent margin on sales to U.S. Government exceed 20%, 50% of profit
Additional Profit Split	None	SIGA receives 50% of remaining profit if any

(Ex. C, at *10, 21; B20-22; B764-65, B771-75 §§ 5.1, 6.5, 6.6; B2046)

In addition, many noneconomic terms were revised to favor SIGA heavily and to undermine PharmAthene's control of ST-246. These provisions included: (1) SIGA's right to resolve disputes unilaterally; (2) SIGA's ability to block any distribution to PharmAthene; (3) PharmAthene's obligation to fund fully the LLC's costs, despite having to split profits 50/50; and (4) SIGA's right to terminate the LLC in several circumstances, with PharmAthene having no right to cure and with all rights to the product reverting to SIGA. (Ex. C, at *10, 21; B735-46, B761-62, B764 §§ 3.2, 3.3, 3.5, 4.2, 5.1(c); B3244-45 (Edwards)) The terms of this LLC proposal received attention at the highest levels. Fasman consulted with Ronald Perelman about the proposed business terms. (B3303-04 (Fasman))

The November 28 meeting and SIGA's subsequent ultimatum. On November 28, the parties met to discuss the LLC. (Ex. C, at *21) Olstein said "that we were bound to negotiate in accordance with the terms of the license term sheet [but] we were willing to consider other terms to avoid a dispute, including a profit split and a higher upfront. But this [i.e., the LLC] was so far off the mark that we couldn't possibly consider this." (B3223-24 (Richman); B3246 (Edwards)) (the LLC was a "non-starter"). In his November 30 follow up

9 The $6 million consisted of $2 million cash upfront, $2.5 million as a deferred license fee to be paid twelve months after execution of the license agreement if certain events occurred, and $1.5 million after financing in excess of $15 million. (Ex. C, at *5)

letter to Coch, Olstein stated that although PharmAthene believes the parties are bound by the terms of the LATS, PharmAthene was willing to consider changes to the LATS, including a 50/50 profit split. (Ex. C, at *21)(citing JTX 270) Wright also testified that PharmAthene was willing to consider changes to the upfront and milestone payments. (B3195 (Wright))

On December 4, Coch responded, saying "SIGA believes the actual value of SIGA-246 is well in excess of $5 billion (based on projected sales that incorporate more realistic assumptions of the size of the market and up-to-date information concerning the likely uses of SIGA-246)...." (B927) While the letter ostensibly offers to continue negotiations if PharmAthene agrees that the LATS is not binding, nowhere does it suggest revised terms to the one-sided and unreasonable LLC, or respond to Olstein's offer of a 50/50 profit split in any way. Olstein responded by letter dated December 6, pointing out that at the initial meeting on November 6 SIGA suggested a 50/50 profit split and that PharmAthene was willing to consider that instead of the terms of the LATS. (B951-52)

Coch then issued an ultimatum to PharmAthene on December 12, to which he sought a response by December 20: "unless PharmAthene was prepared to negotiate 'without preconditions' regarding the binding nature of the LATS, the parties had 'nothing more to talk about....'" (Ex. C, at *10) While the letter acknowledges that PharmAthene had offered to agree to terms different from the LATS, such as a 50-50 profit split, it again made no counter offer to PharmAthene's proposal. (B953-54) On December 20, 2006, PharmAthene filed the complaint in this action.

SIGA's Bad Faith Continues Through Trial

At trial, SIGA's position was that the LATS, as attached to the Bridge Loan and Merger Agreements, was only intended to be "a starting point", and "a jumping-off point" for any negotiations. (B3260-61 (Drapkin)) Drapkin recognized that there was no chance that testimony would be considered credible if he admitted that the LATS was a document negotiated and agreed to by him. To this end, Drapkin testified that he "had no knowledge of that license agreement, or its terms." (B3257 (Drapkin)) Drapkin further testified that he never told Richman to make the final two changes to the LATS during the phone conversation on January 17 and did not even know "to this day" what they were. (B3254; B3258 (Drapkin))

Drapkin's testimony was essentially demolished by the testimony of SIGA's CFO Konatich, who testified that the negotiations were "being run by Mr. Drapkin and I was his instrument" and that Drapkin was "informed each step of the way" and "directing SIGA's response:"

> Q. Were you taking the lead at this time on behalf of SIGA in negotiations on a potential license with PharmAthene for ST-246?
>
> A. [Konatich] The project -- the program was being run by Mr. Drapkin and I was his instrument.
>
> Q. Mr. Drapkin at this time was chairman of the board?

A. Chairman of the board of directors, yes.

Q. Were you keeping Mr. Drapkin informed each step along the way of the progress of the negotiations?

A. Yes, I was.

Q. He was, in turn, directing you how to respond in those negotiations?

A. Yes, he was. (B3256 (Drapkin) (quoting Konatich's deposition testimony))

Drapkin's testimony was also belied by numerous emails, including multiple drafts of the LATS, that were sent to Drapkin. (B1739, B1768, B1789, B1794, B1919, B1921)

The court found, consistent with the overwhelming evidence, that Drapkin was running the negotiations for SIGA: The Court of Chancery found that while "Drapkin denied having any significant involvement in the negotiations for a license agreement.... Drapkin provided Konatich with guidance about how to proceed throughout the negotiations [and] was particularly focused on getting an infusion of cash as soon as possible to fund the development of ST-246." (Ex. C, at *3)

The court also rejected Drapkin's denial of his conversation with Richman concerning the last two changes on the LATS:

> Drapkin does not recall that call and denies saying the parties would have a deal if PharmAthene agreed to two changes. Based on the testimony of other witnesses, the relevant documentary evidence, and the facts recited above, I find Drapkin's testimony in this respect unreliable. In particular, I find that the call between Richman and Drapkin did occur and that Drapkin did request the two changes Richman identified. (Ex. C, at * 4)

Overall, the court stated that: "I find Drapkin's testimony to be largely subjective and otherwise unreliable, especially as it pertains to his belittlement of the LATS as a mere 'jumping off point.'" (Ex. C, at *25, n. 129)

Ultimately, the Court of Chancery rejected Drapkin's "jumping off point" version of events, and found that the parties mutually understood that "any future license agreement would contain terms substantially similar to the LATS:"

> Based on the facts surrounding the negotiation of the LATS and the subsequent dealings between the parties, I find that when the parties negotiated and compromised the terms of the LATS and the Bridge Loan and Merger Agreements, **they mutually understood that any future license agreement would contain terms substantially similar to the LATS**. Therefore, SIGA had a duty to negotiate a license agreement with PharmAthene having economic terms substantially similar to those agreed to in the LATS. The evidence shows that the parties intended the LATS to provide more than just a basic framework for a future license agreement in which the amounts specified for various payments represented little more than mere placeholders.

> Throughout January 2006, SIGA and PharmAthene engaged in significant negotiations regarding the economic terms of the LATS. As a result, they arrived at specific economic terms for a potential license and incorporated them into the LATS." (Ex. C, at *22) (emphasis added)

At trial, Drapkin went so far as to testify that he understood that PharmAthene had no interest in a license agreement, and was only interested in a merger. (B3254 (Drapkin)) Despite the clear evidence that PharmAthene wanted a license if the merger didn't occur (*See* Ex. C, at *6; B1806-10), Drapkin testified that in his January 19 phone conversation with Richman, Richman told him that PharmAthene "had no interest in a license agreement. They wanted to go back to a merger." (B3254 (Drapkin)) During Drapkin's cross examination regarding the merger term sheet, the Court interjected:

> The Court: Isn't it clear to you that, as of that point in time, when they were sending you a draft term sheet that says we're going to negotiate all the way to the end and sign a license agreement and we're going to attach it as an exhibit to this merger agreement, that they wanted to go forward negotiating two documents at once?
>
> The Witness: When I got this, I found that out, yeah. (B3260 (Drapkin))

The Court of Chancery gave no credence to Drapkin's testimony on this point:

> Drapkin's testimony in this regard is undermined by his own admission that he understood that PharmAthene wanted to negotiate two documents at once when he received the draft merger term sheet with the license agreement attached. It would make little sense for PharmAthene to press for the negotiations of a license simultaneously with a merger agreement if it had no interest in a licensing arrangement. (Ex. C, at *6)

Furthermore, when the merger terminated Drapkin tried to conveniently disappear from the post-merger negotiations. Drapkin testified that he had no involvement "whatsoever" with the post-merger termination negotiations. (B3255, B3263, B3264 (Drapkin)) When shown the LLC, his testimony was that he had "never seen it" before, was "not consulted about it," was not advised of the proposed terms and didn't have a "clue" about who came up with its terms. (B3264 (Drapkin)) However, Fasman then admitted that Drapkin "was a central participant," "was copied on every email I sent out," "was a sounding board for [Fasman]," and was one "of [the] members of SIGA's board [that Fasman kept] aware of the terms of the LLC agreement." (Ex. C, at * 29; B3304 (Fasman)) In fact, almost all of the documents discussing the draft LLC and ST-246's valuation were sent to Drapkin. (B1934, B1943, B1955, B2031, B2038, B2040, B2046, B2048, B2280) The Court of Chancery found that Drapkin was a "central participant," "copied on every email," and "a sounding board..." (Ex. C, at *20) Fasman further testified that Ronald Perelman was also involved in determining the business terms of the LLC. (B3303-04 (Fasman))

ARGUMENT

I. The Court Of Chancery Properly Held That Delaware Law Applies To PharmAthene's Claims

A. *Question Presented*: Did the Court of Chancery correctly hold that Delaware law governs this action between two Delaware corporations who chose to be governed by Delaware law in a heavily negotiated document at the heart of this dispute?

SIGA raised this issue on its motion to dismiss and never raised it again.[10]

B. *Standard of Review*: The Chancery Court's decision to apply Delaware law is subject to *de novo* review. *J.S. Alberici Constr. Co. v. Mid-West Conveyor Co., Inc.*, 750 A.2d 518, 520 (Del. 2000); *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1141 (Del. 1989).

C. *Merits*: The Court of Chancery properly held that the Delaware choice of law provision in the Merger Agreement governed this litigation between two Delaware corporations. SIGA argues that the New York choice of law provision set forth in the Bridge Loan Agreement should apply rather than the Delaware choice of law provision in the Merger Agreement because the Bridge Loan Agreement is the more important of the two documents. This assertion should be summarily rejected. As the court explained in deciding to enforce the parties' choice of Delaware law provision in the Merger Agreement:

> Consistent with § 187 of the Restatement, the fact that the parties specified the state whose law will be applied in the Bridge Loan Agreement and the Merger Agreement convinces me that I should look to those agreements to determine the appropriate choice of law, rather than the most significant relationship test. As to which of the two agreements should control the choice of law, I conclude the Merger Agreement takes precedence. The sequence of events is likely to be material to the resolution of the disputes presented in this action, and the Merger Agreement is the last of the agreements signed by the parties. In addition, the scope of that agreement in terms of the relationship between the parties is broader than the Bridge Loan Agreement. Based on those factors and the fact that the Merger Agreement bears importantly on the issues before this Court and is involved in each of at least counts one to five, I will analyze the issues presented by SIGA's motion to dismiss under Delaware law.[11] (Ex. A, at *8)

As noted by the Chancery Court, Delaware has adopted the Restatement (Second) of Conflicts of Laws, §§ 187-188 involving contracts.

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10 In its Post Trial Brief, SIGA relies on Delaware law, fails to raise any choice of law argument, and cites to New York cases, as well as decisions from several other jurisdictions, only in passing. Accordingly, this argument is waived on appeal. *See AT&T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008).

11 Delaware law should also govern the issues raised by PharmAthene's promissory estoppel and unjust enrichment claims, because those claims arise solely from the nature of the relations between the parties reflected in, among other things, the Merger Agreement. *See Weil v. Morgan Stanley DW Inc.*, 877 A.2d 1024, 1032-33 (Del. Ch. 2005).

Moreover, Delaware's General Assembly has determined that in any contract for performance in excess of $100,000 of value where the parties expressly elect a governing choice of law, such choice shall conclusively establish a presumption that the dispute bears a significant, material and reasonable relationship with this State and such a provision shall be enforced whether or not there are other relationships with this State. 6 Del. C. § 2708(a).

Delaware courts will honor such specific choice of law provisions so long as there is a material linkage between the chosen jurisdiction and the transaction. *Annan v. Wilmington Trust Co.*, 559 A.2d 1289, 1293 (Del. 1989); *J.S. Alberici Constr. Co., Inc. v. Mid-West Conveyor Co., Inc.*, 750 A.2d 518, 520 (Del. 2000); *see also Suburban Trust and Sav. Bank v. Univ. of Del.*, 910 F. Supp. 1099, 1013 (D.Del. 1995). Here there could not be a more "material" linkage with Delaware; both PharmAthene and SIGA are incorporated in Delaware.

Second, the Merger Agreement is by far the more material and later agreement between the parties and thus takes precedence over the earlier choice of law provision found in the Bridge Loan Agreement. The Bridge Loan Agreement was negotiated over a few weeks (it was signed on March 20, 2006) and dealt solely with a $3 million loan with an appropriate promissory note attached. It was appropriate to pick New York law because SIGA's executive office, which consisted of Konatich, the acting CEO/CFO, and a controller and two secretaries was in New York. (B3281-82 (Hruby)) If SIGA defaulted on the loan, it would make sense to sue in New York.[12]

On the other hand, the Merger Agreement was the last agreement executed by the parties, involved negotiations and due diligence that spanned three months (it was executed on June 8, 2006), and dealt with all the complexities of a merger of two Delaware corporations one public, SIGA, on private, PharmAthene -- a transaction of far greater importance and complexity than a simple $3 million loan. Also, PharmAthene is not suing to recover its bridge loan. It is suing to enforce SIGA's obligations to negotiate a license under §§ 12.3 and 13.3 of the Merger Agreement, to use best efforts, which became applicable when the merger did not take place. Also §§ 12.3 and 13.3 lie at the heart of the Complaint.

Delaware courts have held that a choice of law provision within a contract "should not be interpreted in a crabbed way that creates a commercially senseless bifurcation between pure contract claims and other claims that arise solely because of the nature of the relations between the parties created by the contract." *Weil v. Morgan Stanley DW Inc.*, 877 A.2d 1024, 1032-33 (Del. Ch. 2005), *aff'd*, 894 A.2d 407 (Del. 2005); *see also Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1048 (Del. Ch. 2006). That principle applies here and requires the consistent application of Delaware law to all these related claims.

The Merger Agreement and its Exhibit H (i.e., the LATS) are key documents at the heart of the Complaint. The Merger Agreement states that it is governed by Delaware law. (B541, §13.5) This is the law that governs this action.[13]

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12 The vast majority of SIGA's employees, 20-25, were in Oregon. (B3281-82 (Hruby))

13 SIGA argues that the most significant contacts are with New York. First, this is irrelevant in light of the choice of law provision in the Merger Agreement. Second, this assertion is factually incorrect.

II. Siga Breached Its Obligations To Negotiate In Good Faith

A. *Question Presented*: Did the Court of Chancery properly find that SIGA breached its duty to "negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the LATS?" (Ex. C, at *29)

B. *Standard of Review*: As noted in *RGC Int'l Investors v. Greka*, 2001 WL 984689, at *11 (Del. Ch. Aug. 22, 2001), "[a] finding of 'bad faith' is necessarily a fact-intensive inquiry." Here, the Court of Chancery's determination was based on an extensive analysis of "the facts surrounding the negotiation of the LATS and the subsequent dealings between the parties" (Ex. C, at *22), as well as SIGA's conduct during the post-merger termination license negotiations. (Ex. C, at *23-26) Accordingly, the standard of review is whether the Court of Chancery's findings were "clearly erroneous." *Bank of N.Y. Mellon v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011); *Reserves Dev. LLC v. Crystal Props., LLC*, 986 A.2d 362, 367 (Del. 2009). Thus, where there are two permissible interpretations of the evidence, the fact finder's conclusions will not be overturned. *Bank of N.Y. Mellon*, 29 A.3d at 236. This deferential standard applies to all findings of fact, including those based on credibility determinations, physical or documentary evidence, or inferences drawn from other facts. *Id.*

C. *Merits*: SIGA first contends that PharmAthene waived any argument that SIGA breached its obligation to negotiate in good faith by failing to raise it in PharmAthene's post-trial brief. (SIGA Br. at 14) This same argument was made by SIGA below, and rejected by the Court of Chancery, which found that PharmAthene "preserved its claim under Count Five[14] by making multiple references in its Post-Trial Opening Brief to SIGA's duty to negotiate in good faith under the Bridge Loan and Merger Agreements." (Ex. C, at *19, n. 116) The Court of Chancery went on to state:

> Although PharmAthene focused most heavily on its claim that an actual licensing contract existed between it and SIGA, it argued in the alternative that "this court has held that ... even an 'agreement to agree' can be specifically enforced" and cited authority that "an agreement to negotiate in good faith may be binding under Delaware law ... and specific performance could, in theory, be an appropriate remedy for breach of such a provision." (citing Pl.'s Post-T. Op. Br. 46 n. 47 (citing *Great-West Investors LP v. Thomas H. Lee P'rs, LP*, 2011 WL 284992, at *9 (Del Ch. Jan. 14, 2011)). (*Id.*; *see also* Pharm. Post T. Op. Br. at 25-35, 46)

Because there were contacts with at least four states; Delaware, Maryland (meetings were held at PharmAthene's headquarters in Annapolis and payments under the bridge loan were directed to Maryland), Oregon (meetings took place there where most of SIGA's employees, 20-25, were located), and New York, it was only logical for the parties -- Delaware corporations -- to select Delaware law. (B3281-82 (Hruby))

14 That SIGA breached its duty to negotiate in good faith under the Bridge Loan and Merger Agreements.

Turning to the merits, SIGA does not dispute that it was contractually obligated to "negotiate in good faith with the intention of executing a definite license agreement in accordance with the terms set forth in the LATS." (*See* SIGA Br. at 14) SIGA's argument is that the Court of Chancery employed the wrong standard for judging SIGA's conduct. Under SIGA's view, because the LATS was allegedly not a binding contract, SIGA was free in the negotiations to ignore its substantive terms. According to SIGA, so long as SIGA went through the motions of negotiating by making proposals dealing with the general topics covered by the LATS, it could not be guilty of bad faith, no matter how outlandish SIGA's proposals might be.

To determine what standard of conduct was embodied in the good faith provisions in the Bridge Loan and Merger Agreements, the court also considered the extensive evidence of the parties' dealings. When a "challenged determination presents a mixed question of fact and law ... [a]lthough ... review of [the] contract interpretation component is *de novo*, the challenged factual component will not be overturned unless it is found to be clearly wrong." *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 2012 WL 2783101, at *9 (Del. July 10, 2012) Moreover, when the trial court's determinations turn on credibility findings based on the testimony of live witnesses, factual findings are given added deference. *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

SIGA's position at trial, espoused by Drapkin, was that "the parties intended the LATS simply to provide a 'jumping off point' by specifying the basic structure of a potential licensing agreement or partnership." (Ex. C, at *22) This contention was flatly rejected by the Court of Chancery, which found that the obligation was to negotiate a license with "economic terms substantially similar to those in the laws." (Ex. C, at *22)

> The evidence shows that **the parties intended the LATS to provide more than just a framework for a future license agreement in which the amounts specified for various payments represented little more than mere placeholders**....[T]he incorporation of the LATS into the Bridge Loan and Merger Agreements **reflects an intent on the part of both parties to negotiate toward a license agreement with economic terms substantially similar to the terms of the LATS if the merger was not consummated**." (Ex. C, at *22)(emphasis added)

The Court of Chancery fully "credit[ed] the testimony and documentary evidence" establishing that PharmAthene would not have provided the financial and operational support that it did unless there had been an understanding that the good faith negotiation provisions in the Bridge Loan and Merger Agreements "required the parties to negotiate in good faith a license agreement with economic terms substantially similar to those contained in the LATS." (Ex. C, at *23)

SIGA makes no effort to justify its actions as being in good faith when judged by the standard adopted by the Court of Chancery. Rather than focusing on the evidence, SIGA posits the following argument: because the Court of Chancery held that "neither the LATS nor the terms therein were binding ... it cannot be that the 'good faith' obligation required

that 'any future license would contain terms substantially similar to the LATS,' as the Court of Chancery also concluded." (SIGA Br. at 16)

SIGA's conclusion simply does not follow from the premise, either as a matter of logic or based on the evidence in this case. There is no logical reason why parties cannot agree to certain guidelines in future negotiations, even though the precise terms of their future agreement have not yet been finalized. Indeed, that is what the evidence at trial demonstrated the parties did here.

The Court of Chancery found that SIGA, by insisting on economic (as well as non-economic) terms that reflected "a complete disregard" for the terms of the LATS, had acted in bad faith by trying to "renegotiate the economics" of the license agreement:

> I find that SIGA's Draft LLC Agreement reflects a complete disregard for the economic terms of the LATS.... In these circumstances, **by trying substantially to renegotiate the economics of a license agreement in light of facts that occurred after PharmAthene had performed its obligations and undertook an economic risk that SIGA and M & F intentionally avoided, SIGA acted in bad faith**. (Ex. C, at *24)(emphasis added)

In addition to economic and non-economic terms put forth by SIGA, the structure of the Draft LLC Agreement contributed to the finding that SIGA breached its duty to negotiate in good faith and the Court of Chancery took pains to rebut the "partnership" theory floated by SIGA at trial:

> Furthermore, I note that the overall **structure**, as much as the specific terms, of the Draft LLC Agreement contributes to my finding that SIGA breached its obligations under the Bridge Loan and Merger Agreements to negotiate a license agreement for ST-246 in good faith.... Moreover, in so far as the title of the LATS calls for a "partnership," PharmAthene's expert Edwards testified credibly that the word "partnership" "is used rather loosely" in the biopharmaceutical industry. T. Tr. 982-83. In fact, of twenty-three SEC-filed biopharmaceutical agreements referred to as "partnerships" found by Edwards, only two formed legal partnerships; the remainder constituted licenses, asset purchases, or other similar transactions. T. Tr. 982-83. Accordingly, SIGA's proposed LLC structure and its one-sided terms support my finding that SIGA did not satisfy its obligation under the Bridge Loan and Merger Agreements to negotiate in good faith. (Ex C, at *26, n. 140)(emphasis in original).

Further, there was abundant evidence of SIGA's "conscious doing of a wrong because of dishonest purpose or moral obliquity" with a "culpable mental state" and that it was "driven by an improper purpose." For instance, the November 17, 2006 Fasman email to his colleagues at M&F and SIGA setting out the terms of the LLC "in non-binding fashion" so that "PharmAthene cannot simply say 'yes'" and Rose's response email on November 18 questioning that the proposal would require the payment of both royalties *and* a profit split as being too good to be true. Also Fasman testifying that he came up with SIGA's initial capital account in the LLC being credited with $300 million on a scratch pad in his office because

"you have to set the capital account somewhere." (B3305-06 (Fasman)) The Court of Chancery also found that Drapkin and SIGA "essentially left the negotiations of the license agreement to individuals who either had no involvement in the previous negotiations and agreements, most notably Fasman, or those acting in their own self-interest, such as Hruby, who were more than happy to disregard the economic importance of the LATS." (Ex. C, at *25)

The Court of Chancery correctly found that the facts of this case were "similar to those presented in *Greka*." (*Id.*)(citing *RGC Int'l Investors, LDC v. Greka*, 2001 WL 984689 (Del. Ch. Aug. 22, 2001). There, Greka acted in bad faith by insisting on terms that contradicted provisions in the term sheet.

> As noted previously, the parties even went so far as to state in the Term Sheet that '[t]he parties hereby acknowledge their mutual agreement to the above terms.' **At the very least, after signing the Term Sheet, neither party could in good faith insist on specific terms that directly contradicted a specific provision found in the Term Sheet**. *Greka*, 2001 WL 984689, at *14 (emphasis supplied)

Here, the facts are even more compelling. The obligation to negotiate in good faith in accordance with the terms of the LATS is embodied in two binding agreements.

SIGA attempts to distinguish *Greka* on two grounds:

> 1. "[I]n Greka, the parties had already agreed upon the essential terms of their deal" and 2. "PharmAthene never performed any of the terms of the LATS." (SIGA Br. at 29-30)

First, the Court of Chancery specifically found that "[b]y the end of January 2006, the parties appear to have agreed on the main economic terms of a license agreement to ST-246." (Ex. C, at *19) "Similarly to *Greka*, the parties here reached a negotiated agreement in the LATS on specific economic terms that they intended would serve as the basis for a final license agreement ...." (Ex. C, at *26)

Second, the Court of Chancery found that PharmAthene performed under the Bridge Loan Agreement by providing SIGA $3 million when SIGA had an immediate need for cash, engaged in negotiating, executing, and performing under the Merger Agreement, and provided assistance that contributed to the success of ST-246 -- all with the understanding that if the merger didn't occur it would receive an exclusive license for ST-246. (Ex. C, at *23, *27-28) The fact that PharmAthene didn't continue to perform under the LATS was a direct result of SIGA's bad faith conduct. *See also Gillenardo v. Connor Broad. Del. Co.*, 2002 WL 991110 (Del. Super. Ct. Apr. 30, 2002), which also involved enforcement of a "good faith" negotiation provision in a letter of intent.

The cases relied upon by SIGA, *Int'l Equity Capital Growth Fund, L.P. v. Clegg*, 1997 WL 208955 (Del. Ch. Apr. 22, 1997), *Phoenix Mut. Life Ins. Co. v. Shady Grove Plaza Ltd. P'ship*, 734 F. Supp. 1181 (D. Md. 1990), *VS & A Commc'ns v. Palmer Broad Ltd.*,

1992 WL 339377 (Del. Ch. Nov. 16, 1992), and *Bernstein v. Felske*, 143 A.D.2d 863 (N.Y. App. Div. 1988), are all inapplicable because, among other reasons, none involved two binding contracts that obligated the parties to use best efforts[15] to "negotiate in good faith with the intention of executing a definitive License Agreement."

Accordingly, the Court of Chancery properly found that SIGA breached its duty to negotiate a license agreement in good faith in accordance with the terms of the LATS. (Ex. C, at * 26)[16]

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[15] The Court of Chancery's analysis is further supported by Siga's breach of the "best efforts" clause of Section 13.3 of the Merger Agreement. "Under Delaware law, 'best efforts' clauses have been held enforceable and the failure of a party to exercise best efforts can form the basis for liability in a breach of contract action." *Conley v. Dan-Webforming Int'l A/S, Ltd.*, 1992 WL 401628, at *19 (D. Del. Dec. 29, 1992) In *Wavedivision Holdings, LLC v. Millennium Digital Media Sys. LLC*, 2010 WL 3706624, at *18 (Del. Ch. Sept. 17, 2010), a seller was required to use "best efforts" to consummate a transactions. The Court of Chancery explained that the seller breached the no solicitation and best efforts clause of the enforceable purchase agreement because it "spent most of its energy and resources helping to develop an alternative to the sale, efforts designed to thwart" the transaction. *See also Crum & Crum Enters., Inc. v. NDC of Cal., L.P.*, 2010 WL 4668456, *4 (D. Del. November 3, 2010)("Although Delaware courts do not define the precise contours of the duty of best efforts, precedent from other jurisdictions is instructive. Generally, the duty of "best efforts" is more exacting than the duty of good faith, and requires the promisor to undertake its contractual obligations diligently and with reasonable effort.").

[16] The result is the same under New York law as it is under Delaware law as stated by the Court of Chancery in *Greka*. *Compare Greka*, 2001 WL 984689, at *14 ("At the very least, after signing the Term Sheet, neither party could in good faith insist on specific terms that directly contradicted a specific provision found in the Term Sheet") *with Teachers Ins. & Annuity Asso. v. Tribune Co.*, 670 F. Supp. 491, 498 (S.D.N.Y. 1987) (stating that an agreement to negotiate in good faith bars "a party from renouncing the deal, abandoning the negotiations, or **insisting on conditions that do not conform to the preliminary agreement**") (emphasis added).

III. The Court Of Chancery Properly Concluded That The Elements Of Promissory Estoppel Were Established

A. *Question Presented*: Did the Court of Chancery properly conclude that PharmAthene had established the existence of the elements of promissory estoppel? The single argument that SIGA raises to challenge the Court of Chancery's finding of promissory estoppel was not raised in the court below, and has therefore not been preserved for appeal.

B. *Standard of Review*: If SIGA's sole contention on appeal is that "[p]romissory estoppel does not apply because the parties' relationship is governed by two valid, enforceable, integrated contracts -- the Bridge Loan Agreement and the Merger Agreement -- and SIGA's promise to negotiate in good faith was incorporated into both of those contracts" (SIGA Br. at 18), this contention, which lacks merit, would be subject to review *de novo* if it had not been waived by a failure to raise it below.

C. *Merits*: The Court of Chancery properly found that PharmAthene had established by clear and convincing evidence the elements of a claim of promissory estoppel that: (1) a promise was made; (2) the promisor reasonably expected to induce action or forbearance by the promisee; (3) the promisee reasonably relied on the promise and took action to its detriment; and (4) the promise binds the parties because injustice can be avoided only by its enforcement. (Ex. C, at *27)

SIGA's failure to raise its argument below. Because SIGA's new and only argument on appeal was never presented to the Vice-Chancellor, SIGA may not raise it now as a ground for overturning the decision below. *Squire v. Bd. of Educ. of Red Clay Consol. Sch. Dist.*, 2006 WL 3190337, at *3 (Del. Nov. 6, 2006); *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 226 (Del. 2005). The pages in the record cited by SIGA (*see* SIGA Br. at 18) to demonstrate that it preserved its current argument -- that promissory estoppel cannot apply here because "the parties' relationship was governed by a series of fully executed contracts" -- make no reference to this argument. The pages cited in SIGA's Pretrial Brief (A956-58) and Post-Trial Brief (A1117-18) argue only certain elements of such a claim: there was no unequivocal promise by SIGA; no reasonable reliance by PharmAthene; and PharmAthene allegedly never provided any meaningful operational or financial support in reliance on any supposed promise. Nor is there any mention of the new argument in SIGA's memorandum of law in the dismissal motion (A867-70; A904-06) or Motion for Reargument. (A1133 n. 1)

SIGA's arguments have no merit. Even assuming that SIGA can now belatedly assert this new argument, it should be rejected. SIGA contends that the Court of Chancery supposedly improperly "read into" the Agreements a "promise that those good faith negotiations would be successful." (SIGA Br. at 19)(emphasis in original) SIGA's argument mischaracterizes the record. In that portion of the opinion cited by SIGA to support its assertion, the Court of Chancery did *not* state that the good faith negotiation obligations contained in the Agreements guaranteed that the negotiations would be successful. Rather, the opinion states that PharmAthene "made the bridge loan ... and provided the operational support it did in reliance on SIGA's promise to afford it a **good**

faith opportunity to obtain control of ST-246." (Ex. C, at *27)(emphasis added) Consistent with this interpretation, the opinion below extensively analyzed the issue whether SIGA acted in bad faith, and thus denied PharmAthene its right to a good faith negotiation and opportunity to gain control through a license agreement.

On this point the Court found as a matter of fact: "I also find that, but for SIGA's bad faith negotiations, the parties likely would have reached agreement on a transaction generally in accordance with the LATS." (Ex. C, at *38)

SIGA also contends that because the Agreements contain provisions obligating SIGA to negotiate in good faith promissory estoppel cannot apply here. None of the legal authorities cited by SIGA supports this proposition. These authorities simply stand for the unremarkable proposition that promissory estoppel cannot be used to contradict or add to the substantive terms of a contract that sets out the parties' bargain. (SIGA Br. at 18, 19) [17] None of the cases cited by SIGA deals with a situation where a contract contained a provision obligating a party to use best efforts to negotiate in good faith an agreement but (as found below) there was no binding agreement on the terms of the transaction. The principle cited by SIGA would potentially apply here if the parties had actually entered into a binding license agreement, and agreed upon the terms of their bargain. But, SIGA cannot have it both ways, there was *no* binding contract with the license terms and promissory estoppel cannot apply because there *was* such a binding contract.

Moreover, there is nothing inconsistent between Drapkin's promise at the February 22, and March 6, 2006 meetings and the terms of the Agreements. The good faith negotiation obligations found in the Agreements are an obvious effort to reflect and implement Drapkin's promise. Nor has SIGA cited any case holding that promissory estoppel cannot apply where a promise to negotiate in good faith appears as part of a contract; the holding in *RGC Int'l. Investors, LDC v. Greka Energy Corp.*, 2001 WL 984689 (Del. Ch. Aug. 22, 2001), is contrary to SIGA's contention. There, the promise to negotiate in good faith that formed the basis for promissory estoppel was found in a Term Sheet in which the parties had agreed to negotiate definitive documentation reflecting the basic terms agreed upon in the Term Sheet, and contained their "mutual agreement ... to negotiate in good faith the contemplated transaction," the so-called "Note Exchange." (*Id.* at *7) This contractual promise was readily accepted as the basis for promissory estoppel, with the court holding that the disappointed party had "reasonably relied to its detriment on the promises contained in the Term Sheet." (*Id.* at *14) Here, Vice-Chancellor Parsons (finding "no material difference" between the promise to negotiate in good faith found in the *Greka* Term Sheet and the Agreements), similarly held that promissory estoppel could be based on PharmAthene's actions to its detriment in "reliance on the LATS and its incorporation into the Bridge Loan and Merger Agreements" which contained the promises to negotiate a license in good faith. (Ex. C, at *26, n. 132, *27)

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17 In each of the cases, the parties had entered into a substantive contract and the party asserting promissory estoppel was seeking to vary the terms of that contract.

IV. The Court Of Chancery Acted Within Its Discretion In Granting Its Equitable Relief

A. *Question Presented*: Did the Court of Chancery act within its discretion in awarding relief in the form of an equitable payment stream that shared some of the characteristics of a constructive trust or equitable lien? This issue was preserved for appeal. (Ex. C, at *29; Ph. Post T. Br. at B3655-57)

B. *Standard of Review*: The factual findings of the Court of Chancery as to what the parties would likely have agreed if SIGA had negotiated in good faith are subject to review under the "clearly erroneous" standard. The choice of remedy by the Court of Chancery is subject to review under the "abuse of discretion" standard. *Int'l Telecharge, Inc. v. Bomarko*, 766 A.2d 437, 439 (Del. 2000) (this Court "defer[s] substantially to the discretion of the trial court in determining the proper remedy"); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 715 (Del. 1983) (noting the "the broad discretion of the Chancellor to fashion such relief as the facts of a given case may dictate.").[18]

C. *Merits*: The Court of Chancery found that "PharmAthene bargained for, at the least, the right to faithful negotiations for a license of ST-246 in accordance with the terms of the LATS the parties previously had negotiated. SIGA, however, denied PharmAthene the benefit of its bargain by conducting those negotiations in bad faith and, thus, is liable for breach of contract and under the doctrine of promissory estoppel." (Ex. D, at *3) The Court of Chancery made numerous findings of SIGA's bad faith. (*See* Ex. C, at *22, 24, 26, 26 n. 140, 34, 38, 39, 41, 44)

In an extensive and meticulous discussion, the Court of Chancery thoughtfully considered how to fashion an appropriate remedy for what it found was SIGA's "glaringly egregious" breach of its duty to negotiate in good faith in order to reap for itself all the benefits of ST-246. (Ex. C, at *44). With respect to damages, the court concluded that under Delaware law a party victimized by another's refusal to negotiate in good faith, based on an agreed upon term sheet, was entitled to a remedy measured by its expectation and not simply reliance interest, citing *Greka.* (Ex. C, at *31-32, *34)(remedies for breach of contract and promissory estoppel often overlap and promissory estoppel may entitle a party to recovery of its expectation interest). *See also Chrysler Corp. v. Quimby*, 144 A.2d 123, 133-34 (Del. 1958) (expectation damages available for both breach of contract and promissory estoppel claims).

The Court of Chancery then turned to PharmAthene's request for "expectation damages in the form of an equitable payment stream that would share at least some of the characteristics of a constructive trust or equitable lien." (Ex. C, at *38) In this connection, the court explained (Ex. C, at *33) that it would take into account Judge Posner's

18 While most authorities indicate that the Court of Chancery's choice of remedy will be reviewed for abuse of discretion, there is also support for *de novo* review. *See Schock v. Nash*, 732 A.2d 217, 232, n.74 (Del. 1999) (noting that there is support for both standards of review).

observations in *Venture Assocs. Corp. v Zenith Data Sys. Corp.*, 96 F.3d 275, 278-79 (7th Cir. 1996):

> [I]f the plaintiff can prove that had it not been for the defendant's bad faith the parties would have made a final contract, then the loss of the benefit of the contract is a consequence of a defendant's bad faith, and, provided that it is a foreseeable consequence, the defendant is liable for that loss -- liable, that is, for the plaintiff's consequential damages.... It would be a paradox to place a lower ceiling on damages for bad faith than on damages for a perfectly innocent breach, though a paradox that the practicalities of proof may require the courts in many or even all cases to accept.

Looking to *Greka*, where the Court found "the best measure of what RGC gave up ... is the price two aggressive adversaries put on it after arms length bargaining," the Court of Chancery decided to use a similar approach. (Ex. C, at *37) The court then performed a detailed factual analysis of the parties' post merger negotiations to determine what would have been the result of good faith negotiations. (Ex. C, at *37-43)

The Court of Chancery found that even though PharmAthene believed the parties were bound by the terms of the LATS, in order to avoid a dispute, it was willing to vary the terms "to some extent" and one variation it would have accepted was a 50/50 profit split. (*Id.; see also* *38) The court also found that PharmAthene would have accepted an increase in upfront and milestone payments from $16 million to $40 million. (*Id.*) Dugary's October 18 analysis had concluded "that 'past and future [ST-246] related investments and costs' equaled $39.66 million, 'supporting an up-front license fee of $40 million [ ] to buy into a 50% participation in future profits of the product.'" (*Id.* at *40) The Court of Chancery found that Fasman's statement at the November 6 meeting, "that the upfront payment would need to be increased to '$40-45 million or more' likely originated from Dugary's October 18 presentation." (*Id.* at *41) The Court of Chancery concluded:

> Had SIGA negotiated in good faith, it would have proposed a transaction consistent with Dugary's presentation: a lump sum payment in an amount sufficient to cover the revised development costs, *i.e.* $39.66 million or more, in exchange for a 50% profit participation without any further license, milestone, or royalty payments. Instead SIGA proposed the Draft LLC Agreement.... The stark contrast between Dugary's October 18 presentation and the later Draft LLC Agreement underscores SIGA's lack of good faith in proposing the Draft LLC Agreement." (*Id.*)

"Employing what Chancellor Strine termed 'remedial discretion' in *Greka*," the Court of Chancery properly found that after SIGA received the first $40 million of net profits on the sales of ST-246, a payment stream of 50% of all profits from the sale of ST-246 and related profits for 10 years from the first sale "would compensate PharmAthene for its expectancy interest with sufficient certainty to meet the requirements for relief from breach of contract and promissory estoppel and to prevent injustice in the circumstances of this

case." (*Id.* at *42) This form of relief, of course, eliminated any risk to SIGA from the possibility that ST-245 might never be a commercial success.

On its appeal, SIGA first attacks the Court of Chancery's fact finding as to what the parties would likely have agreed upon if there had been good faith negotiations. (SIGA Br. at 24-25) SIGA made these same arguments in support of its motion for reconsideration. The Court of Chancery there considered these arguments in extensive detail and painstakingly laid out the facts upon which it based its conclusion. (*See* Ex. D, at *4-6) In rejecting SIGA's factual contentions, the court aptly noted that: "As the trier of fact, the Court evaluates testimony, weighs credibility, and determines what inferences to draw from the evidence adduced at trial" (Ex. D, at *4), and "while SIGA would have weighed the evidence and drawn the inferences differently if it were the trier of fact, it has not shown that the Court's September 22 Opinion was the product of either a misapplication of the law or a misunderstanding of a material fact." (*Id.*, at *6) SIGA's current brief falls far short of demonstrating, as it must to prevail on appeal, that the court's findings were clearly erroneous.

Second, SIGA contends that the equitable relief granted below was "unprecedented." (SIGA Br. at 3) Although the facts of this case appear unique, the equitable principles upon which the Court of Chancery based its decision are well established.

It is a maxim of equity that "equity will not suffer a wrong without a remedy." (Ex. C, at *34) As this Court has stated in *Wilmot Homes, Inc. v. Weiler*, 202 A.2d 576, 580 (Del. 1964):

> Fundamentally, once a right to relief in Chancery has been determined to exist, the powers of the Court are broad and the means flexible to shape and adjust the precise relief to be granted so as to enforce particular rights and liabilities legitimately connected with the subject matter of the action.... It is necessary for the Court to adapt the relief granted to the requirements of the case so as to give to the parties that to which they are entitled.

See also Whittington v. Dragon Group LLC, 2011 WL 1457455, at *15 (Del. Ch. Apr. 15, 2011)("This Court, as a court of equity, has broad discretion to form an appropriate remedy for a particular wrong."); *Gilliland v. Motorola*, 873 A.2d 305, 312 (Del. Ch. 2005) ("As Delaware has long recognized, 'the Court of Chancery [has] the inherent powers of equity to adapt its relief to the particular rights and liabilities of each party.'").

One such remedy is the constructive trust. Identifiable proceeds of specific property can be subject to a constructive trust. *Hogg v. Walker*, 622 A.2d 648, 652 (Del. 1993) The Court of Chancery also recognized there is "[a]nother remedy similar in purpose and operation to a constructive trust" -- an equitable lien. (Ex. C, at *34) The court found that "[i]f one were to consider applying either or both concepts" the specific property might be the intellectual property rights in ST-246 and the proceeds might be subject to an equitable lien. (*Id.*)

Although SIGA characterizes the court's evaluation of what likely would have been the result of good faith negotiations as making a new contract for the parties, that is not the case. When a constructive trust is employed, it does not -- contrary to the contention by SIGA -- purport to enforce a contract based on any actual or assumed agreement of the parties. To the contrary, when a constructive trust is imposed it is contrary to the wrongdoer's intention and it is shaped by the goal of avoiding unjust enrichment. Thus, in *Adams v. Jankouskas*, 452 A.2d 148, 152 (Del. 1982), the Supreme Court, in affirming the Court of Chancery's imposition of a constructive trust, described the function of a constructive trust as follows:

> [A] constructive trust does not arise from the presumed intent of the parties but is imposed when a defendant's fraudulent, unfair or unconscionable conduct causes him to be unjustly enriched at the expense of another to whom he owed some duty.
>
> Constructive trusts, are by equity for the purpose of working out right and justice, where there was no intention of the party to create such a relation, and **often directly contrary to the intention of the one holding legal title**.... Courts of equity, by thus extending the fundamental principle of trusts -- that is, the principle of a division between the legal estate in one and the equitable estate in another -- to cases of actual or constructive fraud **and breaches of good faith**, are enabled to wield a remedial power of tremendous efficacy in protecting the rights of property. *Id.* at n. 4 (emphasis supplied).

See also Hogg v. Walker, 622 A.2d 648, 652 (Del. 1993) ("The doctrine of constructive trust effectuates the principle of equity that one who would be unjustly enriched, if permitted to retain property, is under an equitable duty to convey it to the rightful owner. It is an equitable remedy of great flexibility and generality, and is viewed as 'a remedial [and] not substantive' institution.... 'A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.'") (quoting Cardozo, J.).

Third, to the extent that SIGA is contending that the equitable remedy of a constructive trust is not available in a bad faith breach of contract case, especially one where there has been a finding of "glaringly egregious" bad faith as here, that simply is not the law. *ID Biomedical Corp. v. TM Tech., Inc.*, 1995 WL 130743 (Del. Ch. Mar. 16, 1995)(decided by then Vice-Chancellor Steele) is analogous to the present case. ID Biomedical Corporation ("ID") had entered into a letter agreement with TM Technologies, Inc. ("TM")[19] for TM to use its technology and expertise to develop improvements in ID's DNA diagnostic systems ("IDB system"). TM developed but did not disclose the improvements to ID and instead filed patent applications for them in its own name. ID then licensed the rights to

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19 Like the present case, the parties in *ID Biomedical* contemplated execution of a more formal agreement, which never happened. 1995 WL 130743, at *3.

SUNY. The court found that TM breached the letter agreement, "including the implied covenant of good faith and fair dealing." (*Id.*, at *13) The Court imposed a constructive trust:

> TM possesses property rights in the patent applications through a licensing agreement with SUNY. These powers include the power to use the 'invention' and grant sublicenses. TM acquired these rights through deception and a breach of the Letter Agreement. Therefore, IDB is entitled to a constructive trust over these property rights. (*Id.* at *17)

Accord: "A mere breach of contract, without more, will not ordinarily constitute fraudulent, unfair or unconscionable conduct for purposes of imposing a constructive trust." Wolfe & Pittenger, *Corp. & Comm. Prac. in Del. Ct. of Chancery*, § 12.07[2] (2012). That and more exists here, SIGA's egregious bad faith. *See also Solow v. Aspect Res., LLC*, 2004 WL 2694916, at *6 (Del. Ch. Oct. 19, 2004) ("Solow's claim for a constructive trust upon the profits made by defendants ... must also survive the motion for summary judgment."); *Commodore Motel Corp. v. Pike*, 1987 WL 38104, at *2 (Del. July 17, 1987) ("On remand the Court of Chancery should impose a constructive trust on such portion of Pike's proceeds from the joint venture after determining a fair method of tracing such assets so that Pike may recover any profits attributable thereto, and improperly retained by the appellants.").[20]

A second independent basis for awarding equitable relief was the absence of an adequate remedy at law. SIGA contends that PharmAthene had an adequate remedy at law, namely a reliance damage claim for a few hundred thousand dollars in money damages. (SIGA Br. at 30) SIGA cannot succeed on this contention simply by showing a potential damage claim exists. The remedy at law must be "adequate" and the Court of Chancery found that this reliance damage claim was not.

"[T]he mere fact that a litigant may have a remedy at law does not divest Chancery of its jurisdiction.... The question is whether the remedy available at law will afford the plaintiffs full, fair and complete relief." *Hughes Tool Co. v. Fawcett Publ'ns, Inc.*, 315 A.2d 577, 579 (Del. 1974). Equity may provide remedies "in redress of legal rights for which the legal remedy of the award of damages is inadequate or impracticable." *Chavin v. H.H. Rosin & Co.*, 246 A.2d 921, 922 (Del. 1968). A legal remedy may be "inadequate where a party's injury from breach of contract is either noncompensable or cannot be valued with reasonable

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20 Courts in other jurisdictions have similarly used a constructive trust as a remedy. In *Snepp v. U.S.*, 444 U.S. 507, 515-16 (1980), a CIA officer published a book without submitting for CIA clearance as he was required to do. The Supreme Court affirmed the imposition of a constructive trust on future profits of the book. In *Waldon v. Burris*, 2005 WL 1949624, at *6 (N.C. Ct. App. Aug. 16, 2005), the court affirmed a jury's award of a constructive trust over future profits from a government contract. In *Tlapek v. Chevron Oil Co.*, 407 F.2d 1129, 1132, 1132-34 (8th Cir. 1969), the court affirmed a constructive trust on oil and gas leases that were wrongfully taken from a corporation by an employee who misappropriated inside information. In *Eden Hannon & Co. v. Sumitomo Trust & Banking Co.*, 914 F.2d 556, 563-64 (4th Cir. 1990), the federal court of appeals approved the use of a constructive trust to remedy a breach of a non-competition agreement.

certainty." *El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.*, 669 A.2d 36, 40 (Del. 1995). "A remedy at law must be as practical to the ends of justice ... as the remedy in equity." *Id.* at 39. The courts look to the "adequacy of the legal remedy as a practical matter." *Reserves Dev. LLC v. Severn Sav. Bank, FSB,* 2007 WL 4054231, at *12 (Del. Ch. Nov. 9, 2007)(Parsons, V.C.). The question of whether a damage remedy is "adequate" is left to the discretion of the Court of Chancery. *Mass. Mut. Life Ins. Co. v. Certain Underwriters at Lloyd's of London,* 2010 WL 3724745, at *4 (Del. Ch. Sept. 24, 2010)("The Court of Chancery has discretion in determining whether concurrent jurisdiction in the law courts and the resulting remedy at law are adequate.")

Here, the Court of Chancery made repeated findings that there was no adequate remedy at law. The Court of Chancery was well aware that PharmAthene "theoretically could pursue a remedy at law" on a reliance damage theory to recover the value of its employees' time and salaries, but held in its original decision that "such a remedy would not adequately redress the harm alleged here." (Ex. C, at *29) On reconsideration, the Court of Chancery again explained that where no recovery at law can be had for lost profits that are too uncertain or speculative, "this Court still possesses authority to provide an equitable remedy where there is no adequate remedy at law." (Ex. D, at *3) Once again, the court found that "reliance damages would have been 'basically *de minimis*' under the circumstances of this case and, therefore, inadequate." (*Id.*)

Thus, in reaffirming the bases for awarding equitable relief, the court stated that:

> After determining that PharmAthene lacked an adequate remedy at law, the Court directed its attention to equitable remedies.... The fact that the Court imposed an equitable remedy reasonably designed to compensate PharmAthene for its lost expectancy does not mean, however, that the Court misapprehended the law of remedies. To the contrary, the Court found the underlying purposes of a constructive trust and equitable lien applicable to the circumstances of this case and endeavored to tailor those remedies to redress a wrong, prevent injustice, and award an appropriate remedy in the form of an equitable payment stream. (*Id.*)

A third source of the Court of Chancery's power to grant equitable relief was its finding of promissory estoppel. "'The doctrine of promissory estoppel is an equitable remedy...." *Weiss v. Northwest Broad. Inc.,* 140 F. Supp. 2d 336, 345 (D. Del. 2001). "The doctrine, at bottom, embodies the fundamental idea of the prevention of injustice." *Chrysler Corp. v. Quimby*, 144 A.2d 123, 133 (Del. 1958); *Lord v. Souder,* 748 A.2d 393, 398 (Del. 2000). The Delaware courts "have been unwilling to apply strict contractual interpretation on what is, at base, an equitable remedy." *Grunstein v. Silva*, 2009 WL 4698541, at *10 (Del. Ch. Dec. 8, 2009). In Delaware, "promissory estoppel has evolved and matured beyond being only a contract consideration substitute to support expectancy relief." *Corbin on Contracts* § 8.12, at 101 (1996). As other State Supreme Courts have observed, the development of the law of promissory estoppel "is an attempt by the courts to keep remedies abreast of increased moral consciousness of honest and fair representations in all business dealings." *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 273 (Wis. 1965)(quoting

Peoples Nat. Bank of Little Rock v. Linebarger Constr. Co., 240 S.W.2d 12, 16 (Ark. 1951)). Promissory estoppel is not "defined totally in terms of contract principles," but is "also grounded upon principles of fair dealing familiar to equity jurisprudence." *Kiely v. St. Germain,* 670 P. 2d 764, 767 (Colo. 1983).

Where a cause of action is based on a distinctly equitable theory, such as promissory estoppel, then equitable relief is available. *Hogg v. Walker,* 622 A.2d 648, 652 (Del. 1993)(holding that a constructive trust is a well-recognized remedy "where the legal remedy is inadequate -- such as the distinctively equitable nature of the right asserted")(citing *Adams v. Jankouskas,* 452 A.2d 148 (Del. 1982), as an example of such a case). *See also Envo, Inc. v. Walters,* 2009 WL 5173807, at *8 (Del. Ch. Dec. 30, 2009). SIGA does not dispute the principle that a promissory estoppel claim is equitable and supports equitable relief.

In the particular circumstances here, the Court of Chancery acted well within its discretion in precisely fashioning even-handed equitable relief. That relief prevents SIGA from being unjustly enriched by its misconduct, yet protects SIGA against the possibility that there will be no commercial success for ST-246. At the same time, PharmAthene is given the benefits it would have enjoyed if SIGA had kept its promise. To the extent there is any uncertainty involved in the fashioning of this equitable relief, that uncertainty was caused by SIGA, and it should not profit from its misconduct by relying on uncertainty that it has caused. *See also* § 39(1) of the Restatement (Third) of Restitution and the commentary. ("[T]he rule of § 39 reinforces the contractual position of the vulnerable party and condemns a form of conscious advantage-taking that is the equivalent, in the contractual context, of an intentional and profitable tort.").

V. Attorneys' Fees And Costs Were Properly Awarded

A. *Question Presented*: Did the Court of Chancery err in awarding PharmAthene its attorneys' fees, expenses and expert witness costs?

B: *Standard of Review*: A judge's decision to award attorneys' fees is reviewed for an abuse of discretion and the reviewing court will not "substitute its own notions of what is right for those of the trial judge, if his judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness." *Mahani v. Edix Media Group, Inc.*, 935 A.2d 242, 245 (Del. 2007).

C. *Merits*: The trial court, in the exercise of its discretion, awarded PharmAthene one-third of its reasonable attorneys' fees and one-third of its expert witness fees incurred in this action, relying on the fee-shifting provision in the Bridge Loan Agreement and the bad faith exception to the American Rule. (Ex. C, at *43-45) SIGA raises three issues on appeal. SIGA's first contention is that if SIGA did not breach its obligation to negotiate in good faith, the award of attorneys' fees and costs pursuant to the fee-shifting provision in the Bridge Loan Agreement should be overturned. (SIGA Br. at 34) PharmAthene does not dispute that if there was no breach of the Bridge Loan Agreement its fee-shifting provision cannot be relied on.

SIGA next attacks the finding that it acted "egregiously," contending that "[t]here is no trace of fraud, egregious conduct, or overreaching." (SIGA Br. at 34) As the Opinion makes plain (Ex. C), the conclusion that SIGA acted "egregiously" was supported not only by the summary of the evidence found at page *44 of Ex. C, which SIGA selectively and inaccurately edits,[21] but also the "other relevant facts" found elsewhere in the Opinion, including the conclusions as to SIGA's bad faith found in numerous places in the Opinion.[22]

SIGA's remaining contention is that if PharmAthene is limited to a reliance damages award of a "few hundred thousand dollars," PharmAthene should not be permitted to recover fees and expenses of approximately $2.4 million. (SIGA Br. at 34) If PharmAthene's damages were so limited, then there should be a remand to the Court of Chancery for a determination of the proper amount of attorneys' fees and expenses, bearing in mind the instruction in *Mahani, supra,* that the reasonableness of attorneys' fees and expenses in a contractual fee shifting case "should be assessed by reference to legal services purchased by those fees, not by reference to the degree of success achieved in the litigation." 935 A.2d at 248.

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21 SIGA's Brief selectively and misleadingly quotes from the Opinion to make it seem that the court below misunderstood the facts and mistakenly concluded that SIGA had "insisted" on the increase in the upfront, deferred and milestone and royalty payments. (SIGA Br. at 34)

22 In its Opinion at page *44, the Court of Chancery explicitly stated that its finding of egregious conduct was not based (Ex. C) only on the immediately preceding summary statement but also the "other relevant facts." Those "other relevant facts" are discussed in various places in the Opinion – but are never addressed by SIGA. (*See, e.g.*, Ex. C, at *22, *24, *26, *26 n. 140, *34, *35, *37, *38, *39, *41 and *44)

VI. PharmAthene Is Entitled To An Alternative Payment Stream Based On The Terms Of The LATS

A. *Question Presented*: If this Court does not affirm the Court of Chancery's judgment, a payment stream based on the economic terms of the LATS is appropriate.

B. *Standard of Review*: The standard of review is *de novo* because the issue is whether the Court of Chancery properly applied the law to the economic terms of the LATS. *Bank of N.Y. Mellon v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011); *Reserves Dev. LLC v. Crystal Props., LLC*, 986 A.2d 362, 367 (Del. 2009).

C. *Merits*: While PharmAthene believes the Court of Chancery acted properly in fashioning its remedy and fully supports that remedy, it submits that if this Court disagrees, a payment stream in accordance with the terms of the LATS would be appropriate. The Court of Chancery found that the LATS contains all the economic terms the parties considered important (Ex. C, at *19, *26) and that they could not vary significantly from these terms. (*Id.* at *23) To adopt the language of *Greka* these were also the terms "that these two aggressive adversaries put on it after arms length bargaining." (Ex. C, at *37)

PharmAthene put in evidence at trial through its expert Jeff Baliban ("Baliban") of what would be an equitable payment stream that would generate cash flows to PharmAthene that would put PharmAthene in the same place economically as if SIGA had granted PharmAthene a license on the economic terms of the LATS.[23] Baliban calculated that based on what was known as of December 2006, the date of the breach (Basis 1), the payment of 56% of the revenues generated from ST-246 sales would give PharmAthene the economic equivalent of the LATS. (B2534, ¶68; B1309, ¶50)

In his Supplemental Report dated April 15, 2010 (B1501), Baliban recalculated the appropriate equitable payment stream that would give PharmAthene the equivalent economic value of a license pursuant to the LATS based on "quantity, timing, price and cost assumptions based on what came to be known...as of April 15, 2010." (B1501) This included a U.S. government request for proposal ("RFP") for a smallpox antiviral and SIGA's response and pricing and cost studies performed by L.E.K. Consulting, a consultant to SIGA and on which SIGA relied in formulating its RFP response. (B1504, ¶4) Using the updated information, Baliban calculated the "percent of revenues that would generate the same cash flows to PharmAthene as would the license" to be 48% of ST-246 sales. (B1512, ¶20; *see also* B1309, ¶ 50; B3667-69 (Baliban))

Accordingly, if this Court disagrees with the cash flow awarded by the Court of Chancery it is respectfully submitted that PharmAthene should be awarded an equitable cash stream based on revenues from the sale of ST-246 that would put it in the same place economically as if SIGA had granted it a license on the same economic terms of the LATS.

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23 This issue was preserved for appeal. (Pharm. Op. Post T. Br., at B3655-57)

VII. In The Event This Court Does Not Affirm The Court of Chancery's Judgment It Is Respectfully Submitted That PharmAthene Is Entitled To Specific Performance Granting It A License For ST-246 In Accordance With The Terms Of The LATS

A. *Question Presented*: Did the Court of Chancery err in holding that PharmAthene was not entitled to a judgment granting it a license for ST-246 with the terms of the LATS? This issue was preserved for appeal. (*See* Ph. Post T. Br. at B3626-41)

B. *Standard of Review*: Because PharmAthene's appeal is based on the unambiguous language of the agreements the standard of review is *de novo*. *J.S. Alberici Constr. Co. v. Mid-West Conveyor Co.*, 750 A.2d 518, 520 n. 2 (Del. 2000); *BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 414 (Del. 2012).

C. *Merits*: It is PharmAthene's position that based on the clear, unambiguous language of the Bridge Loan and Merger Agreements, the parties intended to be bound by the terms of the LATS and PharmAthene is entitled to a license for ST-246 with the terms of the LATS. (*See* B705)[24] There was and is no reason to look to extraneous evidence in light of the agreement's clear language.

According to the Supreme Court of Delaware, "[a] party seeking specific performance must establish that (1) a valid contract exists, (2) he is ready, willing, and able to perform, and (3) that the balance of equities tips in favor of the party seeking performance." *Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

1. The LATS is an enforceable contract

In Delaware, whether a term sheet is enforceable centers on two questions: (1) whether the parties intended to be bound by the document; and (2) whether the document contains all the essential terms of an agreement. *See Hindes v. Wilm. Poetry Soc'y*, 138 A.2d 501, 502-04 (Del. Ch. 1958); *SDK Invs., Inc. v. Ott*, 1996 WL 69402, at *7 (E.D. Pa. Feb. 15, 1996). As noted in *Greka*, 2001 WL 984689, at * 13, n. 79:

> The facts of this case therefore are more closely analogous to those of *Asten v. Wangner Sys. Corp.*, Del. Ch., C.A. 15617, Steele, V.C. (Sept. 23, 1999) (granting specific performance of a written settlement agreement that did not omit any material terms but left the negotiation of certain implementing terms to the future); *Hazen v. Miller*, Del. Ch., C.A. No. 1292, let. Op., Jacobs, V.C. (Nov. 18, 1991)(noting that an agreement to make a contract may be specifically enforced if that agreement contains all of the material and essential terms to be incorporated into the final contract, and if those terms are definite and certain).

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24 The license agreement drafted by Olstein contained the terms of the LATS. (B705)

(a) The parties clearly intended to be bound by the LATS

"Delaware adheres to the 'objective' theory of contracts: a contracts' construction should be that which would be understood by an objective, reasonable third party. When measuring whether parties to an agreement intend to be bound to it, their overt manifestations of assent, rather than their subjective desires, control." *BAE Sys. Info. and Electr. Sys. Integration, Inc. v. Lockheed Martin Corp.*, 2009 WL 264088, at *4 (Del. Ch. Feb. 3, 2009). Here, such manifestations of the parties' overt intent to be bound by the LATS are clearly present. First, the parties referenced the language of the LATS in the Merger Agreement and in the Bridge Loan Agreement. For example, Section 12.3 of the Merger Agreement (B541) provides:

> Upon any termination of this Agreement, SIGA and PharmAthene will negotiate in good faith with the intention of executing a definitive License Agreement *in accordance with the terms set forth in the License Term Sheet.* (emphasis added)

The key phrase is "in accordance with," the plain dictionary meaning of which is "agreement; conformity; in accordance with your instruction." *American Heritage College Dictionary* (4th ed. 2002). *See Great-West Investors LP*, 2011 WL 284992, at *6 ("to determine the meaning of ordinary words ... the Court may consider dictionaries....")(citation omitted). Delaware and other jurisdictions have a long history of interpreting the phrase "in accordance with" as creating a binding, controlling limitation.[25]

Second, the parties chose to attach the LATS to those executed documents. By doing so, they converted the previously non-binding LATS into an integral part of the executed agreements and overtly signaled their intention to be bound by the terms of the LATS.

Even if those acts did not themselves evidence the parties' intentions, Drapkin, speaking on behalf of the party now challenging the enforceability of the LATS, made his intention that the parties be bound by the LATS explicit. As testified by Baumel, and as noted by the court below, Drapkin induced PharmAthene to agree to attach the LATS to the Merger Agreement by giving PharmAthene's representatives his position on it:

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25 *See Lawson v. Sussex Cnty Council*, 1995 WL 405733, at * 5-6 (Del. Ch. June 14, 1995)(rezoning request "in accordance with" comprehensive development plan because not "inconsistent" with plan); *Garrett v. Brown*, 1986 WL 4872, at * 9 (Del. Ch. Apr. 22, 1986)(an election of corporate officers "in accordance with" statutory provision required court to adhere to "the same standards" of the statute); *State Farm Mut. Auto. Ins. Co. v. Shahan*, 141 F.3d 819, 823-24 (8th Cir. 1998)(provision in umbrella insurance policy that coverage available "'in accordance with the terms and conditions of ... underlying Underinsured Motorist Coverage...' expressly incorporate[d]" terms and conditions of policy into umbrella policy); *Bayou Steel v. Evanston Ins. Co.*, 2008 WL 4758629, at * 8 (E.D. La. Oct. 28, 2008)(interpreting contract language "in accordance with" as synonymous with terms "pursuant to" and "in conformance to"); *Schreiber v. Kellogg*, 849 F. Supp. 382, 389 (E.D. Pa. 1994)(in interpreting language of a will, "[t]his court finds no significant difference between the phrases 'in accordance with the same terms and conditions' and 'subject to the provisions herein previously contained.'"), *rev'd on other grounds*, 50 F.3d 264 (3d Cir. 1995).

> Attach the term sheet. It's final. And tell your board that that is as good as an executed license agreement. If the deal doesn't close, we can negotiate a definitive agreement in accordance with those terms and you'll have the license.

(B3227 (Baumel); Ex. C, at *6)[26]

Thus, at the time the parties executed the Merger Agreement and the Bridge Loan Agreement, they overtly manifested their intention to be bound by the LATS. The Court of Chancery found that the parties did not intend to be bound based on its reading of the documents for two reasons:

1. The presence of a footer on the LATS; and

2. The fact that the Bridge Loan had a maturity date and PharmAthene received a security interest. (Ex. C, at *16)

Neither factor contradicts the parties' clear intentions to make the terms of the LATS binding four months later by incorporating them into and attaching them to the Merger Agreement and the Bridge Loan Agreement, and in the case of Drapkin, explicitly stating that the term sheet was "final" and "as good as an executed license agreement." (Ex. C, at *7; B3227 (Baumel)) The footer appearing in the LATS reads "Non Binding Terms - SIGA246 January 26, 2006." (B20)

First, the footer is just that, a footer, and not as SIGA would now like to contend a substantive "term" of the term sheet. The Bridge Loan Agreement and Merger Agreement required the parties to negotiate in accordance with the terms of the LATS, not the footer.

When the parties were negotiating the LATS as a stand-alone, unsigned summary of essential terms, it was not meant to be binding. Understandably the date in the footer changed with each successive draft exchanged by the parties to show its continuing non-binding nature (B11 (dated Jan. 3, 2006); B1785 (dated Jan. 9, 2006); B14 (dated Jan. 16, 2006); B20 (dated Jan. 26, 2006)) Thus, it is clear what the footer meant -- that as of January 26, 2006 (the date of the final version of the LATS) the LATS terms standing alone were non-binding. The footer says nothing, however, about the status of that document after January 26.

Notably, unlike during the prior negotiation period, as the LATS was subsequently incorporated over a four month period into (1) PharmAthene's Feb. 10, 2006 proposed merger term sheet, (2) the final March 10, 2006 signed merger LOI, (3) the final March 20, 2006 signed Bridge Loan Agreement, and (4) the final June 8, 2006 signed Merger Agreement, the date in the footer was never changed or updated, nor was any other language inserted into the operative documents to suggest the parties thought the LATS terms were non-binding. (*See also* Edwards Report, B2088, ¶13) To the contrary, the language in those agreements makes quite clear the parties did intend to be bound by the substantive terms of

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26 Since the Court found that Drapkin made this statement, review is *de novo* because it involves the legal ramification of the statement.

the LATS. In fact, the Court of Chancery acknowledged that it accorded the footer "only limited weight." (Ex. C, at *16)

The Court of Chancery gave weight to the fact that the Bridge Loan Agreement had a maturity date and gave PharmAthene a security interest in SIGA's assets, especially ST-246. (Ex. C, at *6) It was of course necessary to have a maturity date to cover the possibility that the closing of the merger might be delayed for a prolonged period, or SIGA might not close on the merger, refuse to negotiate the boiler plate provisions of a more detailed license agreement that the lawyers would add, or act in bad faith as it did here. In these circumstances, the security interest assured that PharmAthene would control ST-246 in the event SIGA refused or otherwise was unable to repay the loan. There is nothing inconsistent with how the parties structured the bridge financing with giving the "in accordance with" language its unambiguous meaning -- the terms of the LATS were binding.

The contracts, read "as whole" in this straight-forward fashion "give each provision and term effect, so as not to render any part of the contract mere surplusage." *Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010); *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1184 (Del. 1992); *Gillenardo*, 2002 WL 991110, at *7.

This Court's decision in *Osborn, supra*, where the Court addressed an alleged ambiguity, is on point. The contract at issue in *Osborn* read in its entirety is as follows:

> I, Michael Kemp agree to pay Lucille Menicucci $275.00 per month plus utilities for twenty years for the purchase of property at 292 S. Delaware and Bay Ave. Slaughter Beach for $50,000.00. 991 A.2d at 1156.

The plaintiff in *Osborn* argued that the contract contained an "indefinite ambiguity" that obviated the award of specific performance. *Id.* at 1159. The Court rejected the plaintiff's contention that the contract could be read in two ways, finding instead that "this contract's only reasonable interpretation creates an installment contract with an option to purchase at the end of the term." *Id.* at 1160. The Court based its holding in *Osborn* on the "plain meaning" of the price term coupled with the Court's recognition that a contract must be read "as a whole" and with a view towards giving effect to "each provision and term" of the contract, "so as not to render any part of the contract mere surplusage. We will not read a contract to render a provision or term 'meaningless or illusory.'" *Id.* at 1159.

(b) <u>The LATS contains all essential terms of the parties' agreement</u>

Under Delaware law, the test for determining whether all essential terms have been agreed upon is:

> [W]hether a reasonable negotiator in the position of one asserting the existence of a contract would have concluded, in that setting, that the agreement reached constituted agreement on all of the terms that *the parties themselves regarded as essential* and thus that the agreement concluded the negotiations.... (Ex. B, at *8)(quoting *Loppert v. WindsorTech, Inc.*, 865 A.2d 1282 (Del. Ch. 2004)(emphasis in original)

That standard is unquestionably met here.

In *Loppert* the Court found that the parties had reached a binding settlement agreement based on the fact that the parties expressly negotiated certain terms and then agreed "we have a deal," notwithstanding that the parties had not agreed on particular draft language, including various "boilerplate" terms. 865 A.2d at 1285-89. The Court concluded that a reasonable negotiator would not interpret the parties' dialogue as other than creating an enforceable agreement. *Id.* at 1289.

Similarly, in this case a reasonable negotiator in PharmAthene's position would conclude that, with the LATS, SIGA and PharmAthene reached agreement on all terms that they themselves regarded as essential for a license to ST-246. The reason why Drapkin did not require or even raise "dispute resolution," "governing law," or any of the other terms that SIGA now contends were essential, is that Drapkin and SIGA did not consider those terms to be essential to a license to ST-246.

Asten v. Wangner Sys. Corp., 1999 WL 803965 (Del. Ch. Sept. 23, 1999) is also on point. *Asten* sued seeking to have a cross-license declared unenforceable. The test the Court applied was:

> The enforceability as a contract of an agreement which leaves a matter for future negotiation depends on the relative importance and severability of the matter left to the future. It is a question of degree to be determined by whether the matter left open is so essential to the bargain that to enforce that promise would render enforcement of the rest of the agreement unfair. *Id.* at *7.

The Court found the intent of the parties to split the proceeds was clear and "an unresolved administrative issue as to how to effect that split does not constitute the omission of a material term." *Id.* at *3.

Another particularly illuminating case is *Parker-Hannifin Corp. v. Schlegel Electr. Materials, Inc.*, 589 F. Supp. 2d 457 (D. Del. 2008). In *Parker-Hannifin*, the parties disputed whether a series of communications constituted a binding agreement to settle a patent infringement case and grant cross licenses. The Court rejected Parker's claim that the missing terms were "essential." In reaching that conclusion, the Court held that an enforceable contract is formed when "all of the terms that **the parties themselves** regard as important have been resolved." *Id.* at 462 (emphasis added). The Court found that Parker's conduct during the drafting process belied its claim that the missing terms were essential, as those terms were neither included in Parker's initial draft proposal, nor suggested by Parker during the negotiations. *Id.* at 463. The final agreement upheld by the Court contained just three essential terms. Here, as in *Parker-Hannifin*, SIGA and PharmAthene reached an agreement on all terms the parties considered essential during the negotiation of the LATS.

In fact, the Court of Chancery noted:

> Specifically, from disclosures made to the SEC, Edwards identified six binding letters of intent that, like the LATS, lacked a number of terms SIGA claims were material and essential. Examples of such missing terms include

those relating to: diligence, timetable obligations, indemnification, competing products, patent prosecution and litigation, confidentiality, ownership and licensing of new technology, and commercialization program particulars. (Ex. C, at *17)

In fact, several aspects of the LATS are set out in more detail than in those LOIs/term sheets. For instance, unlike the LATS, several of the agreements do not set forth the R&D Committee structure. And unlike the LATS, several of the agreements do not address sublicensing. Nevertheless, each by its own terms is a binding agreement. Further, the one comparable agreement SIGA's biotechnology licensing expert, Norman Jacobs ("Jacobs"), cited in his report - the license agreement between Transtech Pharma and Pfizer (B1958) -- does not contain the terms Jacobs contends are essential for a pharmaceutical licensing deal.[27]

Though it is readily apparent that the LATS had all the terms necessary for an operable agreement, the Court of Chancery tried to distinguish these agreements on the grounds that they were signed and labeled binding. But that is not an operative distinction because the Bridge Loan and Merger Agreements were signed, and §§ 2.3 and 12.3 made the economic terms of the LATS binding.

2. PharmAthene is ready, willing and able to perform

The Delaware Supreme Court declared in *Osborn v. Kemp, supra*, that "[w]e will order specific performance only if a party is ready, willing and able to perform under the terms of the agreement." 991 A.2d at 1161. Testimony at trial was undisputed and it is undisputable that PharmAthene was prepared in 2006 to sign the Proposed License Agreement (which incorporated the terms of the LATS) that it sent to SIGA on October 12, 2006. (B705)(B3194-95 (Wright)) Richman reiterated at trial that PharmAthene remains "ready willing and able" to perform under a license in accordance with the terms of the LATS. (B3224; B3664 (Richman)) Moreover, PharmAthene produced abundant evidence at trial that it has the personnel, experience and wherewithal to assume its rightful responsibilities under the terms of the LATS. (B3200 (Richman); *see also* B3232; B3666 (Riddle)) In the time that has passed since this suit was filed, the development of ST-246 has gone forward and is nearly done. SIGA has completed its obligations under the LATS. ST-246 has reached the stage where PharmAthene would now perform its specified "roles and responsibilities," with SIGA essentially being responsible for nothing more than collecting its royalty and other payments under the LATS from PharmAthene.

3. The balance of equities strongly favors PharmAthene and specific performance

As noted by the Court in *Osborn*: "[l]astly, we will only order specific performance where the balance of equities tips in favor of specific performance." 991 A.2d at 1161. Here the facts make it abundantly clear that the balance of equities strongly favors PharmAthene.

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27 For instance, the Transtech Pharma/Pfizer license does not contain any development or sales milestones. Even Fasman conceded that while licensors often ask, they rarely get licensees to agree to regulatory filing deadlines. (B3308; B3672 (Fasman))

VIII. Alternatively PharmAthene Is Entitled To Its Expectation Damages

A. *Question Presented*: Did the Court of Chancery err in denying PharmAthene its expectation damages on the grounds that they were too speculative?

B. *Standard of Review*: The Court of Chancery's decision not to award PharmAthene expectation damages is reviewed for "abuse of discretion." *Int'l Telecharge v. Bomarko*, 766 A.2d 437, 440 (Del. 2000); *Weinberger v. UOP, Inc.*, 517 A.2d 653, 654 (Del. Ch. 1986).

C. *Merits*: The Court of Chancery erroneously held that PharmAthene was not entitled to its expectance damages on the grounds that they were too speculative.

As noted in *Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *29, n. 271 (Del. Ch. Feb. 18, 2010), "while proof of the fact of damages must be certain, proof of the amount can be an estimate, uncertain, or inexact." Here the fact of damages has been established. As the Court of Chancery found "SIGA continues to possess, for example, exclusive rights in the patents to ST-246 and related products. Those rights are valuable in and of themselves." (Ex. C, at *38)

SIGA in November 2006 asserted that since January, 2006 ST-246 had increased in value from $1 billion to $3 to $5 billion. (Ex. C, at *24; B2280) PharmAthene had the right to sublicense under the LATS. With the increase in value, the fact of damages cannot be disputed. The only issue is the amount of damages.

As was stated in *Beard Research Inc. v. Kates*, 8 A.3d 573, 613 (Del. Ch. 2010):

> Public policy has lead Delaware courts to show a general willingness to make the wrongdoer "bear the risk of uncertainty of a damages calculation where the calculation cannot be mathematically proven." Nevertheless, when acting as the fact finder, this Court may not set damages based on mere "speculation or conjecture" where plaintiff fails to adequately prove damages.

In *Henne v. Balick*, 146 A.2d 394, 396 (Del. 1958) the Court stated, "[t]he fact that there is some uncertainty as to plaintiff's damages or the fact that the damage is very difficult to measure will not preclude a jury from determining its value."

As explained in *Cura Fin. Servs. v. Elect. Payment Exch,*, 2001 WL 1334188, at *20 (Del. Ch. Oct. 22, 2001)(emphasis in original):

> Doubts [about the extent of damages] are generally resolved against the party in breach. A party who has, by his breach, forced the injured party to seek compensation in damages should not be allowed to profit from his breach where it is established that a significant loss has occurred. *A court may take into account all the circumstances of the breach, including willfulness, in deciding whether to require a lesser degree of certainty, giving greater discretion to the trier of the facts.* Damages need not be calculable with mathematical accuracy and are often at best approximate.

Because the defendants intentionally breached the Non-Circumvention Agreement, it is just that they bear a fair share of the costs of that uncertainty that their own improper acts caused. *Id.*

1. SIGA's expectation for ST-246 in October and November 2006

Hruby's September 27, 2006 email (B1843) outlines SIGA's understanding of the advanced status of ST-246 at the time of breach (with Hruby predicting an NDA filing with the FDA by the fourth quarter of 2008) and which Hruby reviewed at the Oct. 4 SIGA board meeting (B1849). Thereafter, SIGA prepared a number of detailed analyses regarding the potential value of ST-246, ranging from $3 billion to $5.6 billion. (Ex. C, at *24) (B2280) Importantly, SIGA's detailed financial analyses were not ordinary course or routine market projections just for internal use. They were prepared specifically to support SIGA's obligation to use "best efforts" to negotiate a definitive license agreement in "good faith."

In November 2006 the parties also understood that ST-246 was the only effective treatment for smallpox and potentially worth billions. (B1742) There were no real alternatives then, and there remain none today.

At the time of the breach, pursuant to the Project BioShield Act of 2004 ("Project BioShield"), the U.S. government had set aside significant funding to develop and purchase medical countermeasures with a smallpox antiviral at the head of the list. (B3249 (Rose); *see also* B2508; B3661 (Baliban Report) Ex. 7 at 1) With the sole exception of the eventual timing for sales, everything the parties expected in 2006 has essentially happened.

As PharmAthene demonstrated at trial, even the delay in timing of sales was due to SIGA's breach. SIGA's only experience was in basic scientific research. It did not have PharmAthene's product development, clinical, regulatory, manufacturing, government affairs, business development or marketing expertise. (B3233-34 (Morges); B3200 (Richman); B3188 (Wright))

2. Baliban Report

Baliban determined the net present value ("NPV") to PharmAthene under the terms of the LATS as of December 20, 2006[28] (based on what was known as of that date) as $1,070 million ("Basis I").[29] (B2512 (Baliban Report) at ¶ 10) Baliban reviewed the government requirements to assist the development of a treatment for smallpox and then procure the treatment. (B2512-17 (Baliban Report) at ¶¶ 12-23) He reviewed the development of ST-246 and all the milestones it had met. (B2517-18 (Baliban Report) at ¶¶ 24-25) He analyzed the "salability" of the drug to the government. (B2519-21 (Baliban Report) at ¶¶ 27-30) To understand the parties' expectations at the time of the breach, he also looked at, and

28 The date of breach in this case is the date PharmAthene brought suit December 20, 2006. *West Willow-Bay Court, LLC v. Robino Bay Court Plaza*, 2009 WL 485779, at *4-6 (Del. Ch. Feb. 23, 2009).

29 PharmAthene believes SIGA's own NPV analyses in October and November 2006, in and of themselves, are more than sufficient to support PharmAthene's expectation damages without the need for expert testimony.

analyzed, SIGA's and PharmAthene's own analyses. (B2521-24 (Baliban Report) at ¶¶ 31-39) He evaluated SIGA's and PharmAthene's projections for sales, timing, quantities, cost and pricing and where, based on other relevant data, he disagreed with SIGA and/or PharmAthene, he used his own conclusions and numbers, which typically were much more conservative than those of either party. (B2524-34 (Baliban Report) at ¶¶ 40-67) *See also* (B1289-1304 (Baliban Reply Report) at ¶¶ 5-37)

3. PharmAthene's damages as of December 20, 2006 based upon what is known as of April 15, 2010 - Basis 2

Although damages are measured as of the date of the breach, Delaware courts can look at post breach events in determining damages. *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 17 (Del. Ch. 2003); *Long v. Nealon*, 2002 WL 264460, at *1 (Del. Super. Ct. Feb. 22, 2002).

> Damages are to be measured as of the time of the breach. In this case, the breach occurred when Enterasys issued replacement options on August 24, 2001. Although the breach occurred on August 24, 2001, *the court may consider events that took place after that date in order to aid in its determination of the proper expectations as of the date of breach. Comrie*, 837 A.2d at 17 (emphasis added).

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The damages set forth in the Baliban Supplemental Report, which are based on SIGA's own cost, price and delivery schedules, contained in its submissions to the U.S. government, lay to rest any possible claim that PharmAthene has not provided a responsible estimate of its expectation damages.

IX. Alternatively PharmAthene Is Entitled To Recover Damages Under The Doctrine of Unjust Enrichment

A. *Question Presented*: If this Court does not affirm the Court of Chancery then should PharmAthene be awarded damages or another remedy such as the cash stream under its claim of unjust enrichment?

B. *Standard of Review*: The standard of review is *de novo* because the Court of Chancery after finding unjust enrichment did not determine the appropriate remedy. *Lingo v. Lingo*, 3 A.3d 241, 243 (Del. 2010).

C. *Merits*: While the Court of Chancery found that PharmAthene had established the elements of an unjust enrichment claim (Ex. C, at *27-29), it declined to award relief on the grounds that "PharmAthene's unjust enrichment claim effectively is subsumed in its breach of contract and promissory estoppel claims." (*Id.* at *29) At the time PharmAthene provided funding and assistance, ST-246 was going nowhere. Because PharmAthene provided that funding and assistance, a drug possibly worth $1 billion in January 2006 became worth, in SIGA's estimate, $3 to $5 billion in November 2006. SIGA is now recognizing that value through its first contract for hundreds of millions of dollars with BARDA. PharmAthene is therefore entitled to damages equal to the cash stream found by the Court of Chancery under breach of contract and promissory estoppel theories or a lump sum payment equal to the amount of the unjust enrichment.

CONCLUSION

It is respectfully requested that this Court affirm the judgment of the Court of Chancery, below. Alternatively, if this Court does not affirm the judgment of the Court of Chancery it is respectfully requested that this Honorable Court award PharmAthene:

1. a payment stream of 48% of revenues based on the economic terms of the LATS; or

2. specific performance granting it a license for ST-246 in accordance with the terms of the LATS; or

3. its expectancy damages of either $1,070 million based on what was known in November 2006 plus interest or $401.9 million based on what was known as of April 15, 2010; or

4. its damages under the doctrine of unjust enrichment; or

5. any other relief the Court deems just and proper.

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