IN THE SUPREME COURT OF THE STATE OF DELAWARE

SIGA TECHNOLOGIES, INC., Defendant Below, Appellant, v. PHARMATHENE, INC., Plaintiff Below, Appellee.	REDACTED VERSION October 15, 2012 No. 314, 2012 On appeal from the Court of Chancery of the State of Delaware C.A. No. 2627-VCP

APPELLANT'S REPLY BRIEF IN SUPPORT OF ITS APPEAL AND ANSWERING BRIEF IN OPPOSITION TO APPELLEE'S CROSS-APPEAL

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SIGA's Answer to PharmAthene's Summary of Argument on Cross-Appeal:

1. Denied. SIGA was not obligated to enter into an agreement with PharmAthene on the terms of the License Agreement Term Sheet (the "LATS") or any other terms. In addition, awarding PharmAthene a payment stream based on the LATS would ignore the many tasks and obligations PharmAthene would have been required to complete in order to perform pursuant to the terms set forth in the LATS, and would thus award excessive damages.

2. Denied. PharmAthene has failed to show by clear and convincing evidence that the LATS is a binding contract, that PharmAthene was able to perform under the LATS, or that the equities tilt in favor of specific performance. Specific performance is therefore not appropriate.

3. Denied. Expectation damages are improperly speculative because of unresolvable uncertainties concerning the future development of ST-246. Expectation damages are also unavailable as a matter of law as a remedy for breach of an obligation to negotiate in good faith.

4. Denied. The doctrine of unjust enrichment does not provide a basis for recovery because PharmAthene failed to proffer any evidence of an increase in ST-246's value attributable to any action by PharmAthene.

In its Opening Brief, SIGA demonstrated that the relief awarded to PharmAthene is inequitable and unsupportable as a matter of law. Because the parties were not bound by the terms of the LATS, SIGA's initial proposal of terms that reflected the economic reality existing in the fall of 2006 was not a breach of the obligation to negotiate in good faith. Promissory estoppel is unavailable because the parties' relationship is governed by two valid and fully integrated contracts. Further, PharmAthene contributed little to SIGA or the development of ST-246. For these reasons, there is no basis in law or equity for PharmAthene to receive the windfall the Court of Chancery awarded.

We set out below those facts necessary to correct the many inaccuracies in PharmAthene's brief. These facts show that (1) the LATS was not binding; (2) PharmAthene cannot support an award of specific performance; (3) PharmAthene has not identified any benefit it conferred that would justify relief on the basis of unjust enrichment; and (4) PharmAthene cannot show that the expectation damages it seeks are anything other than wildly speculative.

Counter-Statement of Facts as to PharmAthene's Cross-Appeal

SIGA and PharmAthene Discuss Terms of Their Proposed Collaboration

SIGA and PharmAthene began discussing a collaboration in late 2005. B1739. On January 3, 2006, Eric Richman, PharmAthene's Vice President of Development, sent SIGA an initial draft LATS he had assembled from a template containing proposed "ball park" terms. B1762; Ex. C, at *3; B3197 (Richman). His cover email described the draft LATS as a "Non Binding Draft Term Sheet for [SIGA's] consideration which would allow . . . a partnership" between the parties to develop ST-246. B1762. PharmAthene framed its proposal as a "partnership" because Richman's goal from the start was not a licensing arrangement, but a merger. B3201 (Richman); B2571.

The first draft of the LATS exchanged between the parties, and every draft that followed, bore the words "Non Binding Terms" on each and every page. Ex. C, at *5; B1763; B3174; B1787; B15; B1794; A2; B388; AR2-3. As Richman confirmed at trial, he contemporaneously understood the language "Non Binding Terms" to signify that the terms of the LATS were "open for negotiation." AR554 (Richman).

As negotiations concerning a license arrangement progressed, Dennis Hruby, SIGA's chief scientific officer (A784 (Hruby)), expressed concern to Richman that the draft LATS failed to address significant is-

sues necessary for a collaboration. For example, the draft LATS did not address material terms relating to a research and development committee. Ex. C, at *3-4; B1765.[1] Richman acknowledged that these issues remained open and required resolution. B1785 (email from Richman to Hruby and Thomas Konatich, SIGA's CFO, "Regarding control – we acknowledge that we need to properly discuss the most efficient mechanism that serves the goal of the collaboration . . ."). The Court of Chancery agreed, holding that "a reasonable negotiator . . . would not have concluded that the LATS . . . manifested agreement on all of the license terms that SIGA and PharmAthene regarded as essential." Ex. C, at *18.

According to Richman, Donald Drapkin, the chairman of SIGA's board and Vice Chairman of MacAndrews & Forbes, SIGA's largest stockholder, told Richman on January 17 that the term sheet would be "good to go" provided PharmAthene made two changes to the current draft. Ex. C, at *5; B3206 (Richman). The Court of Chancery, however, accurately found that Drapkin was not an expert in licensing terms. For that reason, the Court of Chancery further found that PharmAthene could not have reasonably relied on this conversation to conclude that the LATS was complete or binding. Ex. C, at *18. PharmAthene never sent SIGA a final version of the LATS,[2] and PharmAthene's board never approved it. Ex. C, at *5, *14; AR58; AR582 (David Wright, then-President and CEO of PharmAthene). The Court of Chancery correctly concluded that the parties never finalized the LATS. Ex. C, at *14.

In early February, the parties ceased negotiating the LATS because of PharmAthene's preference for a merger. AR555 (Richman); AR547-48 (Konatich); B1801. PharmAthene's board materials uniformly indicate that when the parties switched gears, the LATS was still incomplete and subject to negotiation. *See, e.g.*, B43 (January 16, 2006 draft board presentation addressing "Draft License Terms"); B876 (business development overview from January 18 board meeting: "PharmAthene and SiGA are currently negotiating a term sheet."); B378 (January 24 "Follow-up Plan": "PHTN will employ banker to develop merger proposal. PHTN will negotiate license agreement for smallpox product

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[1] As Hruby noted, "[The R&D Committee] is the big one. As we have painfully discovered in our [TransTech Pharma] relationship, the devil is in the details." B1765.

[2] Incredibly, Richman testified that he had not sent a final version of the LATS to SIGA because "I figured [Drapkin] had made the changes" they had discussed on their January 17 call, even though PharmAthene had controlled all drafts. Ex. C, at *5; B3207-08.

in parallel."); B375 (status chart emailed January 20: "Siga [*sic*], term sheets under discussion"); B392 (unsigned minutes for the February 3, 2006 meeting of investment committee: "Management to continue to negotiate with SIGA with respect to both a merger transaction and a licensing transaction"); Ex. C, at *5, *14 (noting that "on PharmAthene's account, it . . . informally reviewed and approved the LATS," but "there is no mention of the LATS . . . in the minutes of the PharmAthene board meeting . . .").

The Parties Abandon the LATS in Favor of a Merger

In furtherance of a potential merger, PharmAthene sent SIGA the first draft of a merger term sheet (the "MTS") on February 10, 2006. Although the draft MTS PharmAthene sent to SIGA stated that it incorporated the LATS and referred to it as "Schedule 1," no copy of the LATS was attached. AR60. SIGA did not believe that any final version of the LATS existed, and requested a copy from PharmAthene. Ex. C, at *14; AR497-98 (Drapkin); AR548 (Konatich). The draft LATS PharmAthene sent, dated January 26, AR1, had few differences from the last version the parties had discussed, but those differences were substantial, B14; B3206 (Richman). It also still did not address the issues SIGA had raised as material, including control of patent prosecution and governance of the joint research and development committee. Ex. C, at *14, *18; AR511-12 (Hruby); AR549-50 (Konatich). Contrary to PharmAthene's claims, this draft was "final" only in the sense that it was the last version drafted by PharmAthene. Moreover, the LATS continued to bear the legend "Non Binding Terms" on each page. AR2-3.

PharmAthene stated that it wanted to negotiate and execute a definitive license agreement simultaneously with a merger agreement in accordance with the terms of the LATS. Ex. C, at *6; AR60. But SIGA did not agree the parties should spend the time and money to negotiate both concurrently. Ex. C, at *6. As a compromise, SIGA consented that the latest draft term sheet would be attached to the merger documentation. AR498-99, B3260-61 (Drapkin). SIGA also consented to terms providing that, if no merger closed, SIGA would negotiate exclusively with PharmAthene for 90 days with the objective of executing a license agreement in accordance with the LATS. AR499 (Drapkin).

On February 23, 2006, PharmAthene circulated to its Board of Directors and Investment Committee a draft MTS that reflected this compromise. A4, 6; A830-31 (Wright); AR492 (Jeffrey Baumel, outside counsel to PharmAthene). The MTS did not require the parties to exe-

cute a license agreement in accordance with the LATS should the merger fail because, as PharmAthene's attorney testified, "you have to have negotiated an agreement to execute first." AR494 (Baumel). There is no indication in the revised MTS or the cover email to the board that PharmAthene was "guaranteed" a license if the merger did not take place or that the LATS was "as good as a license." AR492-93 (Baumel).

On March 10, 2006, SIGA and PharmAthene executed the MTS and a letter of intent to merge. Ex. C, at *7; B454. Like every other version of the LATS that had been circulated between the parties, the LATS attached to the final MTS included the language "Non Binding Terms." AR20-21. Although Richman and Wright claimed the "Non Binding" footer was included in error, AR584 (Wright); AR556 (Richman), the Court of Chancery did not credit this testimony, and instead relied on PharmAthene's counsel, who testified that he included the "Non Binding" footer on the LATS at the parties' direction, Ex. C, at *16; B3230 (Baumel). SIGA's attorney testified that if PharmAthene's counsel had sent over a version of the LATS with the "Non Binding" language removed, he would have needed to obtain his client's approval of that change. Ex. C, at *16 n.102; AR508 (James Grayer, attorney for SIGA).

The Bridge Loan and Merger Agreements

On March 20, 2006, the parties executed a Bridge Loan Agreement. A47; Ex. C, at *7. The MTS expressly provided that SIGA would repay the financing under this agreement if the parties failed to negotiate a license agreement. B454; AR505-06 (Grayer). As the Court of Chancery found, the plain language of the Bridge Loan Agreement expressly contemplated the possibility that the parties might never reach agreement on a license. In fact, the Bridge Loan Agreement provided for a "loan maturity date of two years from the date of the loan and granted PharmAthene a security interest in SIGA's intellectual property" to account for that possibility. Ex. C, at *7; *see also* AR505-06 (Grayer); A830-31 (Wright); AR177-78.

The Merger Agreement was approved by the parties' boards of directors on June 2, 2006, AR320; AR472, and executed on June 8, A119; Ex. C, at *8. Like the MTS, the Bridge Loan and Merger Agreements provide that in the event the merger does not close, the parties will negotiate exclusively for 90 days with the intent of executing a definitive license agreement. A54-55 § 2.3; A193 § 12.3. The version of the LATS attached to the Bridge Loan and Merger Agreements also bears the "Non Binding Terms" legend. A86-87; A274-75. PharmAthene never suggested that the "Non Binding Terms" legend be removed from

the LATS or that SIGA could not deviate from the terms of that non-binding term sheet in subsequent negotiations. AR507-08 (Grayer). Indeed, PharmAthene concedes that if, "after 90 days, . . . a license agreement was not fully fleshed out and negotiated in good faith, then SIGA was open to negotiate with somebody else." A807 (Richman).

The MTS originally required the merger to close by April 24, 2006. AR585 (Wright). Drapkin promised PharmAthene that he would agree to extend the deadline for closing if it became necessary, and SIGA extended it several times. By the time the parties signed the Merger Agreement, the deadline for a merger closing had become September 30. AR585 (Wright).

Development of ST-246

The Court of Chancery found that it could not award expectation damages based on future sales of ST-246 because they are impermissibly "speculative and too uncertain, contingent, and conjectural." Ex. C, at *37. Regulatory approval needed for general sales of ST-246 remains uncertain. Prior to negotiations with PharmAthene, SIGA had begun to test ST-246 for safety. [redacted]

But while ST-246 can (and must) be tested thoroughly for safety in humans, human tests for efficacy in accordance with standard FDA regulations are impossible. Smallpox was eradicated in 1977, and it would be unethical to induce smallpox for purposes of testing.[3] AR523 (Hruby); AR562 (Eric Rose, current SIGA CEO). The only pathway to approval for a drug such as ST-246 is to perform appropriate efficacy testing on animals pursuant to the "Animal Rule." *See* 21 C.F.R. § 314.600-.650. But as the Court of Chancery correctly recognized,

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[3] Even animal trials involving the smallpox virus must be completed at a special Centers for Disease Control lab while wearing "spacesuits" and following World Health Organization protocols. AR513 (Hruby).

there is no assurance that ST-246 will be approved under this rule, and the parties had no reason to believe that approval would happen any time soon. Ex. C, at *31 ("ST-246 might never receive FDA approval, . . . and research delays or problems in animal trials might prevent ST-246 from reaching a viable market in a timely fashion."). As of 2007, only two drugs had been approved under the Animal Rule, neither of which was a new chemical entity like ST-246. AR83; AR565-66 (Rose); AR524-25 (Hruby); AR537-38 (Kessler). The Animal Rule has so far only "been used to extend the indicated use of previously licensed products." AR83.

Proceeding under the Animal Rule, by November 2006, SIGA had completed studies . B1843; AR520-21, AR526 (Hruby); AR543 (Kessler); *see also* AR563-64 (Rose). The results were enormously positive and substantially increased ST-246's potential value. Ex. C, at *8-9; B1843. They were no guarantee of ST-246's value, AR523, AR527-28 (Hruby); B2159-67 ¶¶ 12-14, 22, 33-34.

As these events demonstrate, the potential value of ST-246 markedly increased between the time the parties began their discussions in early 2006 and the end of that year. Nonetheless, at the end of 2006, ST-246 was still at an "early stage in development," and much testing remained to be done. AR522-23, AR524, AR531-32 (Hruby); AR359-60.

[redacted] "ST-246 might never receive FDA approval . . .." Ex. C, at *31.

ST-246's prospects still remain uncertain. SIGA cannot file a new drug application [redacted] *See, e.g.*, AR534 (Hruby); B2169-70 ¶ 40, B2179-80 ¶¶ 74-76.

ST-246's Market Potential

The market potential of ST-246 is not ascertainable. ST-246's principal target customer is the U.S. government, which stockpiles drugs that are useful in bioterrorism defense prior to their FDA approval. Project BioShield Act of 2004, Pub. L. 108-276, 118 Stat. 835 (codified at 6 U.S.C. § 320 and 42 U.S.C. § 247d-6a to 247d-6c). The U.S. government may purchase a drug under this program only if, among other criteria, there exists "sufficient and satisfactory clinical experience or research data . . . [to] support a reasonable conclusion that the countermeasure will qualify for [FDA] approval or licensing within eight years." *Id.* sec. 3, § 319F-2(c)(1)(B)(i)(III)(bb), 118 Stat. 843, 844 (codified at 42 U.S.C. § 247d-6b(c)(1)(B)(i)(III)(bb)). As of December 2006, the U.S. government had yet to articulate standards governing when a drug could be acquired for this program. AR552-53 (Peck); AR545-46 (Kessler) ("[T]he criteria didn't exist in 2006.").

In April 2007, a division of the Department of Health and Human Services indicated that the U.S. government may purchase a smallpox antiviral by 2009 at the earliest for a price of no more than $100 million. AR464, 468; *see also* B2186 ¶ 95. The government did not issue any request for proposals for smallpox drugs like ST-246 until March 2009, and those requests concerned only uses for treatment and not for prophylaxis, which is the broader indication. AR363; AR567 (Rose); AR545-46 (Kessler). Although SIGA was initially awarded a contract under this program, the award was rescinded when another bidder objected. Ex. C, at *11; [redacted] But no additional purchase of this drug is guaranteed. Ex. C, at *31 [redacted]

SIGA's Reply Arguments on Appeal

I. SIGA Did Not Breach Its Obligation to Negotiate in Good Faith.

As set forth in SIGA's Opening Brief, the Court of Chancery's own factual findings establish that contrary to the Court of Chancery's conclusion, SIGA negotiated in good faith. The Court of Chancery held that the LATS and its terms were non-binding and that PharmAthene would have accepted terms substantially less favorable to it, including a three-fold increase in up-front and milestone funding, given the "tremendous" change in the economics of the drug. PA's Op'g Br. at 1; *see also* Ex. C, at *16, 38 & n.228. The Court of Chancery in no way held that SIGA had "insist[ed] on economic (as well as non-economic) terms" in negotiating a license agreement, or that SIGA refused to negotiate. PA's Op'g Br. at 24. To the contrary, SIGA expended great time and expense drafting an LLC agreement that contained commercially reasonable terms consistent with ST-246's then-estimated value. In any event, the draft LLC agreement was SIGA's first proposal and SIGA expressed a willingness to negotiate any and all terms that PharmAthene found unacceptable. By contrast, PharmAthene insisted that the terms of the LATS were binding, refused to negotiate with respect to the key economic terms set forth in the LATS, and did not even wait until the expiration of the exclusive negotiating period before filing its complaint. Ex. C, at *21.

The Court of Chancery concluded that SIGA did not consider itself to be restricted solely to the terms of the non-binding LATS, and so believed it was free to base its initial negotiating position on the economic realities concerning ST-246 as they existed in the fall of 2006. Ex. C, at *26. SIGA surely so believed, and that belief cannot constitute bad faith.

A. PharmAthene Waived Any Argument That SIGA Breached an Obligation to Negotiate in Good Faith

As SIGA explained in its opening brief, PharmAthene waived any claim based on any alleged refusal to negotiate in good faith by failing to raise it in its opening brief post-trial. SIGA's Op'g Br. at 11, 14-15. PharmAthene, citing two footnotes in its Post-Trial Brief, argues that it preserved this argument before the Court of Chancery. The footnotes PharmAthene identifies, however, attempt to bolster its argument for specific performance of the LATS itself, and mention the duty to negotiate only in this context. Nowhere does PharmAthene make any independent argument for redress of breach of the obligation to negotiate.

Pl.'s Post-Trial Op'g. Br. at 46 nn.46-47.[4] Even if a claim is technically laid out in a complaint, failure to seek relief under the claim constitutes waiver of that claim. *Williams* v. *White Oak Builders, Inc.*, 2006 WL 1668348, at *6 n.95 (Del. Ch. June 6, 2006). Nowhere did PharmAthene seek the type of damages awarded here (or any other relief) for failure to negotiate in good faith.[5]

B. The Standard Employed by the Court of Chancery Is Illogical and Creates Ambiguous Law

According to PharmAthene, "SIGA makes no effort to justify its actions as being in good faith when judged by the standard adopted by the Court of Chancery." PA's Op'g Br. at 23. But this entirely misses the point. As set forth in SIGA's Opening Brief, the standard applied by the Court of Chancery is not the law in Delaware or anywhere else and is internally inconsistent. The Court of Chancery was justifiably "not convinced that both parties intended to be bound" to the LATS. Ex. C, at *16. As it further found, "given that [PharmAthene's] own estimate of the market potential had increased roughly threefold, . . . PharmAthene would have agreed" to a threefold increase in upfront and milestone payments at minimum. Ex. C, at *40. Indeed, the Court of Chancery held that, had the parties negotiated in good faith, they would have concluded an agreement that differed from the LATS on every material economic term. *See* Ex. C, at *40-41. Yet despite finding that any resulting agreement of the parties would have materially deviated from the LATS, the Court of Chancery nonetheless concluded that SIGA had acted in bad faith by proposing terms that differed from those contained in the non-binding LATS. Ex. C, at *38. This cannot be the law.

PharmAthene acknowledges that the value of ST-246 had increased tremendously between the LATS discussions and the merger termination. PA's Op'g Br. at 1, 44, 48. But PharmAthene never con-

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[4] PharmAthene's argument that SIGA was required to use its "best efforts" to negotiate a license agreement is similarly waived, and is also irrelevant. At most, "best efforts" requires the parties to use their "best efforts" to negotiate, not execute a license agreement. *See* A193-95 §§ 12.3, 13.3. The "best efforts" clause does not increase the obligations of the parties in this respect.

[5] The sole case cited by PharmAthene as evidence of non-waiver at the trial level is a case addressing an obligation to negotiate; it does not award damages based on the would-be final contract. *Great-W. Investors LP* v. *Thomas H. Lee Partners, L.P.*, 2011 WL 284992, at *9 (Del. Ch. Jan. 14, 2011).

fronts how the changed economic circumstances affected the negotiating postures the parties were able to take. It is unimaginable that SIGA could be bound by a term sheet that the Court of Chancery found was not binding, especially where the economics had changed so "tremendously."[6]

The LLC initial proposal was commercially reasonable under these changed circumstances.[7] If ST-246 will be worth between $3 and $5 billion, PA's Op'g Br. at 48, $100 million up front and a generous profit split would be a bargain price, and PharmAthene had the exclusive right to negotiate for it. And even if the terms SIGA proposed were one-sided and not objectively "fair," SIGA's proposal was a first offer from which SIGA expressly said it was prepared to negotiate. SIGA drew no line in the sand with respect to any proposed term, economic or non-economic. The only condition SIGA set as a negotiation starting point was that it was not bound by the LATS, which the Court of Chancery held to be true. It was PharmAthene that took an unreasonable position and ended negotiations prematurely.

Without any analysis, PharmAthene summarily dismisses the authority cited in SIGA's brief demonstrating that SIGA's conduct cannot be considered bad faith because "none [of the cases cited] involved two binding contracts that obligated the parties to use best efforts to 'negotiate in good faith with the intention of executing a definitive License Agreement.'" PA's Op'g Br. at 25-26 (footnote omitted). To the extent PharmAthene is arguing that none of these cases involved a contractual agreement to negotiate in good faith, PharmAthene is demonstrably

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[6] PharmAthene's reliance on *Teachers Insurance & Annuity Ass'n of America* v. *Tribune Co.* ("*TIAA*"), is misplaced. 670 F. Supp. 491 (S.D.N.Y. 1987). The *TIAA* court found a binding contract where a letter of intent expressly stated that it was a "binding agreement," creating a "firm commitment" to enter a loan transaction, and the parties did not leave open meaningful terms. *Id.* at 498-501.

[7] PharmAthene makes much of an email chain between Fasman and Rose discussing the terms of the draft LLC agreement. PA's Op'g Br. at 24 (discussing email chain at B2046 and positing that Rose thought terms were "too good to be true"). Nothing in the record supports PharmAthene's interpretation; indeed, Fasman and Rose both testified that Fasman was simply explaining the terms of SIGA's proposal (AR569-70 (Rose); B3305 (Fasman)).

wrong.[8] To the extent PharmAthene argues that none of these cases involved "two binding contracts," as opposed to, apparently, one binding contract, it is a *non sequitur*: The fact that the agreement to negotiate in good faith was documented in two contracts rather than one creates no additional obligation. PA's Op'g Br. at 25-26. Finally, the fact that some of the cited cases involved a duty rather than a contract to negotiate in good faith is irrelevant. Each of these cases describes what would constitute a violation of an obligation to negotiate in good faith. SIGA's conduct plainly did not.

PharmAthene cites no authority for its proposed result; it instead attempts to elide the distinctions between this case and *RGC International Investors, LDC* v. *Greka Energy Corp.*, 2001 WL 984689 (Del. Ch. Aug. 22, 2001). But the result in *Greka* depended on the fact that the plaintiff had already provided to the defendant all of the consideration it had promised. By contrast, here PharmAthene had not yet performed the terms of the LATS: it had not yet handed over its portion of the (as yet incompletely drafted) consideration, or indeed anything comparable in value to what it and the Court of Chancery now ask SIGA to remit.[9]

In *Greka*, the breaching party (Greka) induced RGC, the non-breaching party, to forgo its right as a New Saba preferred stockholder to interfere with Greka's attempt to acquire New Saba. Greka's agreement to be bound to take certain actions, as set forth in a term sheet, was critical to that inducement. *Greka*, 2001 WL 984689, at *5-6; *compare VS & A Commc'ns*, 1992 WL 339377, at *10 (party had no obligation to be bound to terms earlier negotiated but expressly made non-binding). But

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[8] *See Phoenix Mut. Life Ins. Co.* v. *Shady Grove Plaza Ltd. P'ship.*, 734 F. Supp. 1181, 1184 (D. Md. 1990) (agreement to "proceed in good faith to attempt to negotiate a mutually acceptable partnership agreement."); *VS & A Commc'ns Partners, L.P.* v. *Palmer Broad. Ltd. P'ship*, 1992 WL 339377, at *2-4, *9 (Del. Ch. Nov. 16, 1992) ("non-binding" "preliminary understanding" signed part-way through parties' negotiations that contained a detailed description of the term progress to date required purchaser to "use reasonable efforts to provide Seller with 'written financing commitments in the usual form,'" which Chancellor Allen held imposed a duty to negotiate in good faith).

[9] PharmAthene clumsily counters that it would have performed the LATS had it not been for SIGA's bad faith. PA's Op'g Br. 25. This is irrelevant, and in any event, no evidence demonstrates that this is so.

after Greka had acquired New Saba at RGC's expense, Greka attempted to avoid payment by demanding that RGC agree to new terms. *Greka*, 2001 WL 984689, at *15. Greka's act of bad faith was to induce RGC to forgo rights (which was all of the consideration required of RGC under the term sheet) in reliance on an agreement, and then to demand that RGC return to the bargaining table after RGC had irrevocably given up those rights, now having nothing left to bargain with. The court awarded damages styled as "expectation" damages, but in fact they were equivalent to reliance damages. That is so because the consideration RGC reasonably expected to receive in the transaction, had Greka acted in good faith, was equivalent in value to the consideration RGC had already provided to Greka in reliance on Greka's promise. *Id.* at *16.

In contrast to the plaintiff in *Greka*, PharmAthene has not given SIGA anything for which it did not receive its reasonably expected consideration, and SIGA has not failed to provide anything it was obligated to provide in return. After the merger terminated, PharmAthene came to the negotiating table still holding everything it ever had to offer: its purported ability to raise money and its purported ability to market drugs. (PharmAthene never had marketed a drug under Wright's leadership, B3195 (Wright), but its executives claimed to have experience in marketing.) Nor had SIGA received what it had initially asked of PharmAthene – namely, at least $16 million to fund ST-246 research and the successful introduction of a fully approved ST-246 to the market. PharmAthene had voluntarily provided only minimal operational support and had extended SIGA a $3 million loan (one purpose of which was to fund expenses in connection with the merger, A56), which SIGA repaid with interest. Ex. C, at *8 & n.60, *27 & n.144; PA's Op'g Br. at 11-12. PharmAthene was not "tricked" into providing either this support or the loan. PharmAthene drafted the term sheets and agreements and controlled the edits. B11 (LATS); AR1 (LATS); AR60 (MTS); AR22, AR187 (Bridge Loan); AR243 (Merger). PharmAthene had given up nothing it could not regain. It had not given up anything near what it was supposed to give up under the LATS, and certainly not anything worth nearly half of the profits from ST-246.

II. Promissory Estoppel Provides No Basis for Relief.

PharmAthene's arguments in favor of the Court of Chancery's application of promissory estoppel both fall short. Although the Court of Chancery concluded that two valid and fully integrated contracts applied here, it also awarded relief on the alternative theory of promissory estoppel. While PharmAthene was permitted to plead claims for breach of contract and promissory estoppel in the alternative, *see Grunstein* v. *Silva*, 2009 WL 4698541, at *9 (Del. Ch. Dec. 8, 2009), relief under promissory estoppel here became barred as a matter of black letter law once the Court of Chancery found that the parties' relationship is governed by valid and integrated contracts. This argument was not waived. Until the Court of Chancery ruled that the parties had a contractual duty to negotiate, and simultaneously ruled that PharmAthene was entitled to quasi-contractual relief under promissory estoppel, SIGA had no inconsistency argument. SIGA consequently could not have waived its arguments that promissory estoppel is inapplicable under these circumstances.

A. Promissory Estoppel Is Unavailable Here

Promissory estoppel is not available where there is a valid, fully integrated contract. *Genencor Int'l, Inc.* v. *Novo Nordisk A/S*, 766 A.2d 8, 12-13, 15 (Del. 2000); *Cent. Mortg. Co.* v. *Morgan Stanley Mortg. Capital Holdings LLC*, 2010 WL 3258620, at *13 (Del. Ch. Aug. 19, 2010), *rev'd on other grounds*, 27 A.3d 531 (Del. 2011); *Grunstein*, 2009 WL 4698541, at *8 & n.52 (citing *Chrysler Corp. (Del.)* v. *Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1033-34 (Del. 2003)). Here, the Court of Chancery recognized not one, but two fully integrated contracts. Ex. C, at *34. Having found valid contracts, it is black letter law that the Court of Chancery was foreclosed from awarding relief under promissory estoppel.

In finding promissory estoppel, the Court of Chancery relied on alleged oral promises Drapkin made to PharmAthene that PharmAthene "could expect to receive control over ST-246 through a license agreement," and SIGA's promise to PharmAthene "to afford it a good faith opportunity to obtain control of ST-246." Ex. C, at *27. But SIGA's obligation to negotiate in good faith was contractual, based on the clauses in the Bridge Loan and Merger Agreements, Ex. C, at *34, so it plainly cannot give rise to a remedy in quasi-contract. SIGA's Op'g Br. at 18. Likewise, PharmAthene, a sophisticated business entity, could not reasonably have relied on Drapkin's alleged oral assurance that negotiations would ultimately prove successful, even if any such assurance had been sufficiently clear and unambiguous to be enforceable (it could not have

been), given the integration clauses in the Bridge Loan and Merger Agreements. *Id.*

Failing to come up with any real rebuttal to SIGA's argument, PharmAthene instead attempts to confuse the issue by accusing SIGA of trying to "have it both ways" in asserting the existence of valid contracts. PA's Op'g Br. at 28. But SIGA has never disputed the existence of these two valid contracts – the Bridge Loan Agreement and the Merger Agreement.

Relying on *Greka*, PharmAthene further posits that promissory estoppel can be used "where a promise to negotiate in good faith appears as part of a contract." PA's Op'g Br. at 28. But *Greka* does not support this reading. In *Greka*, the court declined to resolve the parties' "somewhat confusing debate about whether the Term Sheet is a contract that is enforceable." *Greka*, 2001 WL 984689, at *13. Instead, the court held that regardless of whether it was a contract, "the Term Sheet gave rise to an enforceable obligation on Greka's part to negotiate in good faith." *Id.* The court held that RGC would be entitled to the same damages pursuant to promissory estoppel "[i]n the alternative," in case the Term Sheet was not a binding contract but merely a promise that RGC reasonably relied on to its detriment. *Id.* at *14.[10] PharmAthene cites no other authority for the remarkable proposition that promissory estoppel can add terms to otherwise valid, integrated contracts.

B. SIGA Did Not Waive Its Contention That Promissory Estoppel Is Unavailable Here

At trial, both parties focused argument on whether the LATS created a binding obligation to enter into a contract in accordance with its terms. Ex. C, at *45. PharmAthene pleaded promissory estoppel in the alternative but did not allege with specificity what promise induced reliance. See, *e.g.*, Pl.'s Pre-Trial Br. at 66-68 (these pages contain no citation to deposition testimony or documentary evidence showing the existence of the vague "promise" described briefly therein). Even in post-trial briefing, PharmAthene spent only one of its seventy pages generically reciting the elements of promissory estoppel. Pl.'s Post-Trial Br. at 67-68 (reciting the elements of promissory estoppel with no record citation to the "promise" inducing reliance); *see also Sears, Roebuck & Co.* v. *Midcap*, 893 A.2d 542, 547 n.4 (Del. 2006) (defendant's general

[10] To the extent *Greka* suggests more than the foregoing, we would respectfully submit it was wrongly decided and should not be followed.

objection preserved its specific defenses against plaintiff's argument in light of plaintiff's eleventh-hour presentation of its theory). SIGA's argument in reply was naturally to point out PharmAthene's failure to specify a promise. SIGA's Post-Trial Br. at 56.

Whatever PharmAthene's theory was, the Court of Chancery's ruling far outstripped it. To the minimal extent PharmAthene did argue promissory estoppel, it did so only in the alternative to its contract theory. As set forth above, recovery on PharmAthene's theory of promissory estoppel is not legally possible if, as occurred here, the court identified valid and integrated contracts governing the subject matter. Yet having found two valid contracts, the Court of Chancery also awarded relief based on the doctrine of promissory estoppel. In other words, the argument currently pressed by SIGA arises from the dispositions of the Court of Chancery, and not from PharmAthene's prior positions. Under the circumstances, the interests of justice require the Court to hear SIGA's appeal on this issue. Del. Sup. Ct. R. 8.

Moreover, as addressed above, the Court of Chancery purported to rely on at least one of two "promises" from SIGA to PharmAthene: the alleged oral promises Drapkin made, and SIGA's "promise" to negotiate in good faith, as documented in the Bridge Loan and Merger Agreements. Ex. C, at *27. PharmAthene itself, however, had failed to specify any promise that was supposedly enforceable by reason of promissory estoppel. PharmAthene's theory was plainly defective for that reason. The Court of Chancery attempted to remedy that defect by itself specifying the allegedly relevant promises. Because the theory adopted by the Court of Chancery went beyond PharmAthene's arguments, SIGA was not on notice of that theory and was therefore not required to present its current arguments in order to preserve them for appeal. *See Reddy* v. *MBKS Co.*, 945 A.2d 1080, 1085-86 (Del. 2008) (where neither side advocated position the court ultimately took, the interests of justice were served by allowing issue on appeal, even if not "fairly presented" at trial); *see also United States* v. *Gallant*, 306 F.3d 1181, 1188-89 (1st Cir. 2002); *United States* v. *Sofsky*, 287 F.3d 122, 125 (2d Cir. 2002); *United States* v. *Alba*, 933 F.2d 1117, 1120 (2d Cir. 1991) (where no prior notice of what court might hold, arguments against this holding not forfeited for failure to present them at trial).

III. There Is No Basis for the Relief Awarded by the Court.

A. The Limits Imposed By New York Law Apply

As SIGA showed in its opening brief, New York law strictly limits damages for breach of an obligation to negotiate in good faith to reliance damages. *See Goodstein Constr. Corp.* v. *City of New York*, 604 N.E.2d 1356, 1359-60 (N.Y. 1992). PharmAthene does not dispute this. Accordingly, should the Court find that New York law applies, PharmAthene has conceded that any recovery is limited to reliance damages.

As to whether New York or Delaware law should apply, PharmAthene first argues that SIGA has waived its argument that New York law applies. PA's Op'g Br. at 20 n.10. But SIGA expressly argued in its motion to dismiss that New York law applies to the dispute. SIGA's MTD Br. at 13-15. Once the Court of Chancery ruled that Delaware law applied, that ruling became the law of the case; no purpose would have been served by re-arguing it. Thus, no waiver has occurred. *Robinson* v. *Meding*, 163 A.2d 272, 274-75 (Del. 1960) ("[A]ppeal from a final judgment brings up for review all interlocutory or intermediate orders involving the merits and necessarily affecting the final judgment which were made prior to its entry."); *Volvo Constr. Equip. N. Am., Inc.* v. *CLM Equip. Co.*, 386 F.3d 581, 604 (4th Cir. 2004).

PharmAthene next argues that Delaware law should apply because SIGA and PharmAthene are both incorporated in Delaware. PA's Op'g Br. at 21. But state of incorporation is not a substantial factor in choice of law analysis for a contract dispute. *See, e.g., UbiquiTel Inc.* v. *Sprint Corp.*, 2005 WL 3533697, at *3-4, *6 (Del. Ch. Dec. 14, 2005) (applying Pennsylvania law under the most significant relationship test even though all entities involved were Delaware corporations). As the Court of Chancery acknowledged before invoking the Merger Agreement choice of law provision, four of the five factors in assessing the most significant relationship between a state and a disputed contract are the place of contracting, the place of negotiation, the place of performance, and the subject matter of the contract. Ex. A, at *6 (citing *Feinberg* v. *Saunders, Karp & Megrue, L.P.*, 1998 WL 863284, at *7 (D. Del. Nov. 13, 1998)). The last concern is the domicile or place of incorporation of the parties. The "contacts are to be evaluated according to their relative importance to the particular issue." *Feinberg*, 1998 WL 863284, at *7 (quoting Restatement (2d) of Conflicts of Laws § 188(2) (1971)). As this case is about a contract dispute, not corporate governance or the certificate of incorporation, state of incorporation is the least relevant factor.

PharmAthene further argues that the Merger Agreement, which

designates Delaware law, "is by far the more material and later agreement between the parties." PA's Op'g Br. at 21. While it is true that the Merger Agreement was the later in time of the two agreements, PharmAthene offers no response to SIGA's arguments that the Court of Chancery relies on the Bridge Loan Agreement substantially more than it does on the Merger Agreement. SIGA's Op'g Br. at 21. And PharmAthene's claims that SIGA breached its obligation to negotiate in good faith arise equally under the Bridge Loan and Merger Agreements. Additionally, the Court of Chancery awarded relief in part based on the financing PharmAthene provided pursuant to the Bridge Loan Agreement (Ex. C, at *27), and the Bridge Loan Agreement – not the Merger Agreement – is the basis for part of the attorneys' fee award (Ex. C, at *43).

PharmAthene also does not dispute the significant contacts New York has with this dispute that were identified in SIGA's Opening Brief. Instead, PharmAthene attempts to deflect this point by arguing that "there were contacts with at least four states; Delaware, Maryland . . . , Oregon . . ., and New York." PA's Op'g Br. at 22 n.13. PharmAthene operates in Maryland, and SIGA operates in Oregon, but, unlike New York, no significant event occurred in either. Ex. C, at *6-10; A790 (Hruby). Moreover, no party has ever argued that either Oregon or Maryland law should apply. This is not a choice between four different states' laws; it is a choice between New York's and Delaware's.

Finally, no "senseless bifurcation" would result by applying New York law to PharmAthene's quasi-contractual claims, as PharmAthene contends. PA's Op'g Br. at 21. Choice of law analysis becomes necessary only where states' laws differ. Neither party contends that New York's law as to SIGA's and PharmAthene's other points of appeal differs from Delaware's. *See, e.g.*, SIGA's Op'g Br. at 15 n.7, 18 n.8; PA's Op'g Br. at 26 n.16.

B. The Relief Awarded Is Impermissibly Speculative

Even under Delaware law, a court may not create for parties a contract to which they did not agree. SIGA's Op'g Br. at 23-28. *Colvocoresses* v. *W.S. Wasserman Co.*, 28 A.2d 588, 589 (Del. Ch. 1942) ("[N]o court can make a new contract for" parties who are unable to reach agreement.); *Great-W. Investors*, 2011 WL 284992, at *13 n.79. Even if a proposed modification would create a "just" or "fair" result, the court still may not invent a contract for the parties, or change the terms of a contract they have negotiated. *In re Appraisal of ENSTAR Corp.*, 604 A.2d 404, 414-15 (Del. 1992). It would be inequitable and impermissibly speculative for the court to conjecture what agreement the parties might have reached. Yet this is exactly what the Court of Chancery

did when it speculated that the parties "likely" would have agreed to increase upfront and milestone payments from $16 million to $40 million and to a 50-50 profit split. Ex. C, at *38. PharmAthene does not attempt to defend the Court of Chancery's speculation as to what agreement the parties might have reached; this alone is sufficient to overturn the award.

PharmAthene argues instead that the Court of Chancery carefully and "painstakingly laid out the facts upon which it based its conclusion." PA's Op'g Br. at 31. But the Court of Chancery's factual findings as to what the parties would have accepted are not supported, or else are contradicted by record evidence. Indeed, PharmAthene does not dispute that the parties never presented evidence of what terms they might have been willing to accept. Elliot Olstein, attorney for PharmAthene, wrote to SIGA that, "At no time, did we indicate that we were prepared to accept a 50-50 proposal or any other proposal in lieu of the binding terms of the [LATS]." Ex. C, at *38 n.228 (alteration in original); A403. At most, PharmAthene said that it would "consider some amendments to [the LATS]; for instance . . ., there could be a 50-50 split of the profits as long as the License Fee (upfront and deferred payments) and milestones of the [LATS] do not change." A602 (emphasis added). Although SIGA pointed to this evidence in its motion for reconsideration below and its opening brief on appeal, neither the Court of Chancery nor PharmAthene even attempts to explain how it could be the case that PharmAthene was prepared to agree to a $40 million upfront payment in light of Olstein's unequivocal assertion. And while PharmAthene now contends that it "was willing to consider changes to the upfront and milestone payments," PA's Op'g Br. at 17, PharmAthene's contention misrepresents the testimony from Wright that PharmAthene cites for this point. Wright actually testified only that "PharmAthene [was] willing to enter into a license agreement in which the business terms varied to some extent from the LATS." B3195 (Wright). Moreover, the evidence cited by the Court of Chancery does not indicate that SIGA would have agreed to $40 million in upfront and milestone payments, either; at most, it suggests that SIGA thought something in the range of $40-45 million as part of an upfront payment might be appropriate. A771 (Fasman); A677-79 (Smallpox Drug Potential Market Presentation).

Recognizing the impermissibility of a judicially made contract, PharmAthene argues in the alternative that judicial imposition of a constructive trust does not require any finding of a likely contract between the parties. PA's Op'g Br. at 32. This is inaccurate – a constructive trust is no more allowed to be speculative than any other remedy. *Cochran* v. *Nagle*, 1995 WL 819054, at *4 (Del. Ch. Feb. 27, 1995). But in any event, a constructive trust enforces a pre-existing entitlement, which the

court must first find. *Adams* v. *Jankouskas*, 452 A.2d 148, 152-53 (Del. 1982) (constructive trust provides relief where one party has been wrongfully deprived of property which is held legally by another); *see also Hogg* v. *Walker*, 622 A.2d 648, 652 (Del. 1993) (same). As set forth in SIGA's Opening Brief, PharmAthene has no entitlement to ST-246 since the parties never contemplated that PharmAthene would gain title to ST-246 or any benefit resembling the windfall awarded by the Court of Chancery's order. SIGA's Op'g Br. at 31.

Nor, as PharmAthene argues, does SIGA's alleged "bad faith" justify imposing a constructive trust. SIGA did no more than advance an opening position consistent with its interests given the "tremendous" change in ST-246's potential since the parties had negotiated the LATS. This conduct is not "bad faith." But even in cases involving bad faith, a court may award only damages that can be satisfactorily proven. PharmAthene (and the Court of Chancery) rely on *Venture Associates Corp.* v. *Zenith Data Systems Corp.* for the notion that expectation damages may be available for breach of an obligation to negotiate in good faith. In fact, the court in that case declined to award such damages, and found that the "practicalities of proof" will nearly always render it impossible to award damages on an incomplete contract, no matter how deliberate the bad faith misconduct. 96 F.3d 275, 278-80 (7th Cir. 1996).

In any event, the Court of Chancery's "equitable discretion" does not permit imposition of a constructive trust to remedy a strictly legal claim; such relief is reserved for claims of "equitable ownership of specific property." *See McMahon* v. *New Castle Assocs.*, 532 A.2d 601, 608-09 (Del. Ch. 1987). PharmAthene has not been wrongfully deprived of title to ST-246 because it was never contemplated that title would pass to PharmAthene. Even if the Court of Chancery had found the LATS binding, the LATS envisioned a license, not a transfer of ST-246. While "equity will not suffer a wrong without a remedy," PharmAthene's own authority makes plain that, in order to gain access to equity, an equitable claim must first be identified. PA's Op'g Br. at 31. PharmAthene's rights are all contractual, *see id.* at 14-16, and damages are available, no matter how much PharmAthene, or the Court of Chancery, may wish they were greater. Should this Court find that PharmAthene is entitled to relief, only reliance damages are available. The Court of Chancery, crediting uncontradicted evidence by SIGA, found such damages would amount to $205,000. Ex. C, at *35; A590.[11]

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[11] Although PharmAthene chose not to present any evidence concerning reliance damages, this Court, should it deem it appropriate, could

IV. PharmAthene Is Not Entitled to Recover Fees or Costs.

For attorneys' fees to be awarded pursuant to the "bad faith" exception, PharmAthene must show SIGA's behavior to have been egregious. *See Abex Inc.* v. *Koll Real Estate Grp., Inc.*, 1994 WL 728827, at *20 (Del. Ch. Dec. 22, 1994) (awarding attorneys' fees where defendant had acted "in bad faith and vexatiously" by forcing litigation in order to delay payment of contract obligation); *see also Arbitrium (Cayman Is.) Handels AG* v. *Johnson*, 705 A.2d 225, 231-32 (Del. Ch. 1997). No such extreme conduct has been shown here.[12]

While PharmAthene cites language from the post-trial decision in which the Court of Chancery found that SIGA acted in bad faith, as set forth above, SIGA did no more than advance a legitimate negotiating position consistent with its economic interests. The "other relevant facts" identified by PharmAthene as constituting bad faith, PA's Op'g Br. at 36 n.22 (citing Ex. C, at *22, *24, *26 & n.140, *34-35, *37, *38, *39, *41, *44), uniformly address the same underlying conduct: that SIGA advanced a negotiating position consistent with its own economic interests but differing from the terms the parties had memorialized in the non-binding LATS. Such conduct does not constitute bad faith at all, much less the fraud, egregious conduct, or overreaching required to justify an award of attorneys' fees.

Finally, should this Court conclude that PharmAthene is limited to reliance damages, the award of attorneys' fees should likewise be reduced. PharmAthene incurred excessive fees in pursuing speculative relief. It should not be rewarded with $2.4 million in fees it incurred for this waste when at most it was entitled to only $205,000 in damages.

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remand the case so that PharmAthene could submit evidence and the Court of Chancery could make further factual findings as to the amount of any reliance damages.

[12] PharmAthene concedes that it is not entitled to attorneys' fees under the Bridge Loan Agreement if this Court should hold SIGA did not breach that agreement. PA's Op'g Br. at 36.

Cross-Appellee's Arguments on Cross-Appeal

V. The Court of Chancery Correctly Concluded that the LATS Is Not Binding.

1. Question Presented: Did the Court of Chancery err in concluding that the LATS is not binding?

2. Scope of Review: The Court of Chancery's factual conclusions that the parties did not intend the LATS to be binding and that the LATS lacked essential terms necessary for a binding agreement will be overturned only if PharmAthene can prove that they were clearly erroneous. *Bank of N.Y. Mellon Trust Co.* v. *Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011).

3. Merits: The Court of Chancery correctly concluded that the LATS is not a binding contract because: (1) PharmAthene and SIGA did not intend it to be; and (2) it lacks terms necessary to constitute a binding agreement. Ex. C, at *13-18 (citing *Carlson* v. *Hallinan*, 925 A.2d 506, 524 (Del. Ch. 2006)).

A. PharmAthene and SIGA Did Not Intend the LATS to Be Binding

The Court of Chancery correctly found that the LATS was never a binding document. As an initial matter, the parties always included the "Non Binding" legend on the LATS, even when attaching it to the MTS and the Bridge Loan and Merger Agreements. Ex. C, at *16. According to PharmAthene's attorney, this reflected a deliberate choice by the parties. Ex. C, at *16; B3230, AR494 (Baumel); AR318-19; *see also* AR508 (Grayer); Ex. C, at *16 n.102 (discussing Grayer's testimony). PharmAthene argues that the "Non Binding Terms" legend did not apply after January 26, 2006. PA's Op'g Br. at 40. But this argument must be rejected because it ignores testimony by PharmAthene's own attorney that he deliberately left the "Non Binding Terms" legend on the term sheet when it was attached to the other documents because that was the agreement of the parties. Ex. C, at *16.

Additionally, the Court of Chancery correctly found that the parties agreed in the Bridge Loan and Merger Agreements to "negotiate" – not "execute" – "a license agreement in accordance with the terms of the LATS." Ex. C, at *16. If the parties had intended to bind themselves to "execute" a license agreement in accordance with the terms in the LATS, they could have done so, but they did not. Ex. C, at *16; AR494 (Baumel). Moreover, the Bridge Loan and Merger Agreements expressly contemplate the possibility that the parties might never reach a final

license agreement after negotiating for 90 days. Ex. C, at *7. Also, the Bridge Loan Agreement has a maturity date, which would have been unnecessary if the LATS were in effect, and provides PharmAthene with a security interest in SIGA's assets. Ex. C, at *16; *see also* A52 § 1.1, A56 § 3.1(j); AR506 (Grayer). The security interest in SIGA's assets would have been unnecessary if the LATS were enforceable. AR506 (Grayer). The MTS also addressed what would happen under the Bridge Loan Agreement if the parties never agreed on a merger or license. B457.[13]

The Court of Chancery also found that the parties never intended the LATS to be binding as a standalone document. Notwithstanding PharmAthene's claims to the contrary, there is no record that PharmAthene's board ever approved the LATS. Ex. C, at *14. There is also no evidence that PharmAthene ever sent SIGA a copy of the January 26 "revised and final LATS" until February 10, 2006, after SIGA had requested it, or that PharmAthene ever communicated its alleged acceptance of the LATS before that date, which are both inconsistent with PharmAthene's supposed belief that it had been approved.[14]

PharmAthene argues that the contractual obligation to negotiate "in accordance with" the terms of the LATS renders the LATS binding. PA's Op'g Br. at 39. But none of the cases it cites is applicable, because none addresses the negotiation of future agreements or the incorporation of terms expressly labeled "Non Binding." *Id.*[15] PharmAthene also

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[13] The June 30, 2006 proxy statement on the proposed merger does not indicate that PharmAthene's board ever approved the LATS. B97-98; AR555 (Richman). PharmAthene reviewed and approved the portion of the proxy statement describing the background of the proposed merger. AR555 (Richman); AR583 (Wright); AR495-96 (Baumel); AR508-09 (Grayer).

[14] The only evidence PharmAthene put forward on this point is Richman's testimony that he communicated his acceptance to Drapkin by phone on January 19, which Drapkin denied. Ex. C, at *14.

[15] *Lawson* v. *Sussex County Council* addresses a county council's ability to make zoning decisions "in accordance with" a development plan. 1995 WL 405733, at *4-5 (Del. Ch. June 14, 1995). *Garrett* v. *Brown* addresses the Court of Chancery's authority under 8 *Del. C.* § 225 to order a stockholders' meeting "in accordance with" § 211 (addressing meetings of stockholders generally) or § 225 (addressing voting rights of nonstock corporations). 1986 WL 4872, at *9 (Del. Ch. Apr. 22, 1986). *See also State Farm Mut. Auto. Ins. Co.* v. *Shahan*, 141 F.3d 819, 823-24 (8th Cir. 1998) ("in accordance with"

argues that the LATS was binding because it was attached to the MTS, the Bridge Loan Agreement, and the Merger Agreement. The Court of Chancery, however, correctly rejected this argument, in part because the MTS, Bridge Loan, and Merger Agreements are drafted to preserve the possibility that the parties might never conclude a binding license. Ex. C, at *16. The parties understood, and their agreements provided, that "after 90 days, if a license agreement was not fully fleshed out and negotiated in good faith, then SIGA was open to negotiate with somebody else." A807 (Richman); AR601 (deposition testimony of Elizabeth Czerepak, former PharmAthene board member); A54-55 § 2.3, A193 § 12.3 (provisions in the Bridge Loan and Merger Agreements allowing SIGA to enter into a "Competing Transaction").

Even if, as it claims, PharmAthene subjectively believed that the terms in the LATS were binding, the Court of Chancery expressly found that SIGA did not share that interpretation or represent that it did. Ex. C, at *16; AR557 (Richman) (admitting he did not know how SIGA viewed "Non Binding" footer); AR494 (Baumel) ("Non Binding" legend left on the LATS because "[t]hat was the [parties'] agreement"); AR512 (Hruby) (did not consider the terms of the LATS to be binding, and PharmAthene never indicated that it believed otherwise). Thus, there was no meeting of the minds sufficient to sustain an enforceable contract. *United Rentals, Inc.* v. *RAM Holdings, Inc.*, 937 A.2d 810, 835-36 (Del. Ch. 2007) ("[T]he private, subjective feelings of the negotiators are irrelevant and unhelpful to the Court's consideration of the contract's meaning, because the meaning of a properly formed contract must be shared or common"); *Dweck* v. *Nasser*, 2012 WL 161590, at *15 (Del. Ch. Jan. 18, 2012) (stockholder's agreement not effective because parties "never had a meeting of the minds" as to its terms).

B. The LATS Lacks Essential Terms

As the Court of Chancery correctly found, the LATS was not

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meant incorporation of an existing contract into another existing contract); *Bayou Steel* v. *Evanston Ins. Co.*, 2008 WL 4758629, at *8 (E.D. La. Oct. 28, 2008) (interpreting whether insurance claim was brought pursuant to Longshore and Harbor Workers' Compensation Act); *Schreiber* v. *Kellogg*, 849 F. Supp. 382, 389 (E.D. Pa. 1994) (clause in will dictating that income be paid to grandchildren "in accordance with" the same terms and conditions under which their parents had received income meant that spendthrift protections that applied to parents' income were also applicable to grandchildren's income), *rev'd on other grounds*, 50 F.3d 264 (3d Cir. 1995).

binding on the independent ground that it lacked essential terms. Ex. C, at *16-18. "Where the parties fail to agree on one or more essential terms, there is no binding contract." *Patel* v. *Patel*, 2009 WL 427977, at *3 (Del. Super. Feb. 20, 2009); *see also Intellisource Grp., Inc.* v. *Williams*, 1999 WL 615114, at *4-5 (D. Del. Aug. 11, 1999). As SIGA's licensing expert, Norman Jacobs, testified, the following essential terms are absent from the LATS: (i) defined funding obligations; (ii) resolution of the structure, composition, and dispute resolution procedures for the joint research and development committee or other committees necessary for the development and commercialization of the drug; (iii) delineation of patent prosecution and infringement responsibilities; (iv) sublicensing restrictions; (v) minimum sales and diligence obligations; and (vi) provisions defining the structure of any contemplated partnership, respective contributions, and conditions for termination or dissolution. Ex. C, at *17; *see also* AR337-40 § 5.9.

Even if the LATS could be binding without definite resolution of one or several of these terms, the absence of all of them establishes that the LATS is not a binding agreement. "[S]ignificant additional discussion and negotiation would have been required . . . to clarify the actual intended operation of the terms whose brief summaries were listed on the [LATS], as well as to address the many other provisions . . . which would have been required to create a viable partnership between PharmAthene and SIGA." AR340 § 5.10.

The terms that were absent from the LATS were material to SIGA and would have needed to be addressed before SIGA could enter into any binding agreement. During negotiations, SIGA expressed that they were necessary. Ex. C, at *17; B1765 (emphasizing importance that terms of R&D committee be outlined, and noting that "the devil is in the details."); AR511 (Hruby). Richman acknowledged the importance of these issues, B1785, but they were not resolved before the parties abandoned negotiating a license agreement in favor of a merger, AR511-12 (Hruby); AR549-50 (Konatich). While PharmAthene argues that an agreement may be binding where only "boilerplate" remains to be negotiated, PA's Op'g Br. at 42 (citing *Loppert* v. *WindsorTech, Inc.*, 865 A.2d 1282, 1285-89 (Del. Ch. 2004), *aff'd*, 867 A.2d 903 (Del. 2005); *Asten, Inc.* v. *Wangner Sys. Corp.*, 1999 WL 803965, at *3, *7 (Del. Ch. Sept. 23, 1999); *Parker-Hannifin Corp.* v. *Schlegel Elect. Materials, Inc.*, 589 F. Supp. 2d 457, 462-63 (D. Del. 2008)), clearly more than "boilerplate" remained here; instead, essential terms remained to be negotiated. Ex. C, at *17. Richman conceded that many terms typical to license agreements are absent from the LATS. AR558 (Richman); *see also* Ex. C, at *17 (additional testimony that the LATS failed to address

important topics included in biotechnology licensing best practices).

Thus, as the Court of Chancery correctly concluded, PharmAthene failed to prove that the parties had reached agreement on all essential terms. Ex. C, at *18. PharmAthene argues that the Court of Chancery credited the opinion of Marc Edwards, PharmAthene's licensing expert. PA's Op'g Br. at 42-43 (citing Ex. C, at *17). Edwards opined that the LATS was binding because certain terms it lacked (and that SIGA considered material and essential) were also lacking from six letters of intent that were filed by unrelated parties with the SEC. *Id.* But the Court of Chancery did not credit this testimony, and the plain language of its post-trial opinion makes clear that it only described Edwards' opinion. Ex. C, at *17. As SIGA's expert explained, the fact that the letters were filed with the SEC is not evidence that they were binding – in fact, Edwards put forth no basis on which the Court could find that those letters were binding. AR334-36 §§ 5.4-5.5; AR535-36 (Jacobs). And indeed, Edwards conceded that the LATS "is missing terms that one typically finds in [contracts of this type]," and admitted that, even if the terms in the LATS were sufficient for the parties to "commence" a relationship, there would still "need to be many things that the parties would have to work out in their ongoing relationship." AR501 (Edwards); Ex. C, at *17 (noting that PharmAthene's expert had created a template that identified several items as "best practices" that were in fact absent from the LATS).

PharmAthene also argues that a license agreement between other parties cited as an example in Jacobs' report supports PharmAthene's argument that the LATS was binding because that license agreement "does not contain any development or sales milestones." PA's Op'g Br. at 43 n.27. But this is clearly wrong. The license agreement cited specifically includes milestone payments during the R&D phase, upon regulatory filings, and upon commercial launches. B1991-97; AR346 § 6.8.[16]

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[16] In the same footnote, PharmAthene misrepresents testimony from SIGA. PharmAthene inaccurately characterizes Mr. Fasman's testimony as "conced[ing] that . . . licensors . . . rarely get licensees to agree to regulatory filing deadlines," apparently in support of PharmAthene's argument that development or sales milestones are not essential. PA's Op'g Br. at 43 n.27. Mr. Fasman's actual testimony, however, was that licensors and licensees may reach different payment schemes depending on their relative bargaining power. AR503-04 (Fasman).

VI. The Court of Chancery Correctly Denied Specific Performance of the LATS.

1. Question Presented: Did the Court of Chancery err in denying specific performance of the LATS?

2. Scope of Review: The Court of Chancery's factual conclusion that PharmAthene did not show it was entitled to specific enforcement of the LATS will be overturned only if clearly erroneous. *Bank of N.Y. Mellon*, 29 A.3d at 236; *Lingo* v. *Lingo*, 3 A.3d 241, at 243-44 (Del. 2010) (quoting *Schock* v. *Nash*, 732 A.2d 217, 232 (Del. 1999)).

3. Merits: To obtain specific performance, PharmAthene must "prove the existence and terms of an enforceable contract by clear and convincing evidence." Ex. B, at *10. Even if PharmAthene could establish that the LATS was binding – and it cannot – it cannot meet the higher standard of clear and convincing evidence. Moreover, PharmAthene still cannot show, as it must to obtain specific performance, that it is ready, willing, and able to perform under the LATS, and that the balance of equities tilts in its favor. *Corkscrew Mining Ventures, Ltd.* v. *Preferred Real Estate Invs., Inc.*, 2011 WL 704470, at *6 (Del. Ch. Feb. 28, 2011).

The LATS is nowhere near sufficiently complete to justify specific performance of its terms. Specific performance "will only be granted when . . . a court does not need to supply essential contract terms." *Ramone* v. *Lang*, 2006 WL 905347, at *10-11 (Del. Ch. Apr. 3, 2006); *see also Liquor Exch., Inc.* v. *Tsaganos*, 2004 WL 2694912, at *2 (Del. Ch. Nov. 16, 2004) ("[I]t is a fundamental principle of equity that the remedy of specific performance will only be granted as to an agreement . . . as to which there is no need to ask the court to supply essential terms."); *Mehiel* v. *Solo Cup Co.*, 2005 WL 5750634, at *7 (Del. Ch. May 13, 2005) (same). As shown above, the Court of Chancery correctly held the LATS lacks essential terms necessary to constitute a license agreement. Ex. C, at *16, *18.

Additionally, the equities weigh decidedly against granting specific performance. PharmAthene is a sophisticated party represented by able attorneys, and it gave up very little in its failed pursuit of a collaboration with SIGA. A834 (Vice Chancellor Parsons) ("By the same token, are there huge equities on PharmAthene's side? Not really.") SIGA's efforts, not PharmAthene's, are responsible for ST-246's success. Without requiring or obtaining assistance from PharmAthene, SIGA:

- x Acquired ST-246, AR510 (Hruby), and initiated development, A787 (Hruby); B1762 (PharmAthene praising SIGA's "outstanding work . . . during the preclinical program.");
- [redacted]
- x Shouldered final decision-making responsibility and accountability to the National Institutes of Health ("NIH") for the execution of the grants and contracts, AR515 (Hruby);
- x [redacted][17] and
- x Obtained the $16.5 million grant from the NIH in the summer of 2006, AR521 (Hruby).

Also without PharmAthene's help, since the Merger Agreement was terminated, by the time of trial, SIGA had:

- x [redacted] AR524 (Hruby); B2221;
- x Discovered, after extensive testing, that ST-246 [redacted]
- x [redacted] AR526, AR528-29 (Hruby);
- x [redacted] and
- x [redacted] AR533 (Hruby).

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17 [redacted]

By contrast, the only specific contributions by PharmAthene recognized by the Court of Chancery (beyond vague "operational support") were: (1) SIGA "likely" used $600,000 from the Bridge Loan to pay for the first human safety test of ST-246; and (2) representatives from PharmAthene attended and "apparently answered some questions during a reverse site visit between SIGA and the NIH in July [2006]." Ex. C, at *8.[18] In short, it has been, and under the Court of Chancery's Order and Final Judgment will continue to be, SIGA's efforts, not PharmAthene's, that are overwhelmingly responsible for ST-246's potential success. In the process of developing ST-246 and in bringing it to market, SIGA has borne and continues to bear the entire risk that ST-246 may ultimately be unsuccessful.

Finally, specific performance is also barred for the additional and independently sufficient reason that PharmAthene has not shown that it is ready, willing, and able to perform the terms of the LATS. As ST-246 has yet to be approved or marketed, the tasks assigned to the parties under the LATS are far from complete. Under the LATS, PharmAthene would be responsible for "manufacturing of Phase I clinical trial material"; "commercial material"; "Clinical—future"; "Contract response and management"; "DOD and HHS, other Marketing"; and "Ex-US Marketing." A2-3. In addition, PharmAthene and SIGA would be responsible for working together on regulatory issues. *Id.* PharmAthene has not shown that it is capable of accomplishing the significant work remaining to be done.[19]

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[18] PharmAthene attempts on the basis of this visit to claim credit for an NIH grant SIGA subsequently obtained, but PharmAthene's contention is without support. AR521 (Hruby); PA's Op'g Br. at 12.

[19] For example, PharmAthene's facilities have never been subjected to "very specific audits" [redacted] AR567-68 (Rose); AR560 (Dr. Valerie Riddle, involved in government contracting with PharmAthene). In fact, [redacted] a different vaccine was canceled because neither PharmAthene nor the other respondents presented a product that could qualify for FDA licensure within eight years. B3195 (Wright); AR560 (Riddle). PharmAthene's expertise in pox virology is questionable. AR518, AR521, B3293 (Hruby); AR559 (Riddle).

VII. PharmAthene Is Not Entitled to Relief Under the Doctrine of Unjust Enrichment.

1. Question Presented: Did the Court of Chancery correctly decline to award relief under the doctrine of unjust enrichment?

2. Scope of Review: The Court of Chancery's factual findings that PharmAthene failed to proffer any evidence that its efforts were responsible for the increase in value of ST-246 will be overturned only if clearly erroneous. *Bank of N.Y. Mellon*, 29 A.3d at 236; *Lingo*, 3 A.3d at 243-44.

3. Merits: The Court of Chancery correctly found that PharmAthene is not entitled to relief under the doctrine of unjust enrichment. To recover under unjust enrichment, a plaintiff must show (a) enrichment; (b) impoverishment; (c) a relation between the enrichment and the impoverishment; (d) absence of justification; and (e) absence of a remedy at law. Ex. C, at *27 (citing *Jackson Nat'l Life Ins. Co.* v. *Kennedy*, 741 A.2d 377, 393 (Del. Ch. 1999)). Where "'a contract already governs the relevant relationship between the parties, . . . the contract remains the measure of [the] plaintiff's right.'" Ex. C, at *27 (citations omitted) (internal quotation marks omitted) (citing *BAE Sys. Info. & Elec. Sys. Integration, Inc.* v. *Lockheed Martin Corp.*, 2009 WL 264088, at *7 (Del. Ch. Feb. 3, 2009); *MetCap Sec. LLC* v. *Pearl Senior Care, Inc.*, 2007 WL 1498989, at *5 (Del. Ch. May 16, 2007)).

As the Court of Chancery found, to the extent PharmAthene argues that it is entitled to relief under the doctrine of unjust enrichment because it provided assistance in the form of the Bridge Loan, such assistance is covered by the Bridge Loan Agreement and cannot serve as the "enrichment" necessary for a claim of unjust enrichment (especially since SIGA repaid the Bridge Loan in full). Ex. C, at *28. To the extent PharmAthene bases its claim for unjust enrichment on the operational assistance it allegedly provided to SIGA, PharmAthene failed to proffer evidence as to the value of that contribution, that it expended any more than a minimal sum, or to establish a causal connection between such assistance and an increase in value of ST-246. Ex. C, at *28, *35. Without this proof, PharmAthene cannot establish that no adequate remedy exists at law, nor can it prove damages under the claim.

VIII. The Court of Chancery Correctly Declined to Award Expectation Damages.

1. Question Presented: Did the Court of Chancery correctly deny PharmAthene's request for expectation damages on the ground that such damages are too speculative?

2. Scope of review: The Court of Chancery's factual determination that expectation damages are too speculative will be overturned only if clearly erroneous. *Bank of N.Y. Mellon*, 29 A.3d at 236.

3. Merits: The Court of Chancery correctly held that PharmAthene was not entitled to expectation damages because such damages were speculative. Ex. C, at *37. A plaintiff may recover only such damages as are proven with reasonable certainty. *See, e.g., Chemipal Ltd.* v. *Slim-Fast Nutritional Foods Int'l, Inc.*, 350 F. Supp. 2d 582, 597 (D. Del. 2004); *Callahan* v. *Rafail*, 2001 WL 283012, at *1 (Del. Super. Mar. 16, 2001); *Kenford Co.* v. *Cnty. of Erie*, 537 N.E.2d 176, 180 (N.Y. 1989).

As set forth above and in SIGA's Opening Brief, the LATS was not binding and it would be speculative even to conclude that the parties would have reached agreement. Thus, expectation damages must be rejected under *Goodstein Construction*, 604 N.E.2d 1356. "[I]f no agreement was reached and . . . it cannot even be known what agreement would have been reached, there is no way to measure the lost expectation." *Id.* at 1361 (alteration in original) (citing 1 Farnsworth, Contracts § 3.26a, at 314).

Additionally, as the Court of Chancery noted, "numerous uncertainties" loomed between ST-246 and its first sale. Ex. C, at *37. ST-246 is a new and unique drug; there is nothing comparable on the market today. AR537-38 (Kessler). Even as of trial in January 2011, ST-246 remained in development and had never been sold. AR534 (Hruby). "[E]vidence of expected profits from a new business is too speculative, uncertain and remote to be considered where there is no history of prior profits." *Re* v. *Gannett Co.*, 480 A.2d 662, 668 (Del. Super. 1984), *aff'd*, 496 A.2d 553 (Del. 1985). This uncertainty is compounded where the product in question is a new drug requiring regulatory approval for all but BioShield sales. *See, e.g., Amaysing Techs. Corp.* v. *Cyberair Commc'ns, Inc.*, 2004 WL 1192602, at *4-5 (Del. Ch. May 28, 2004) ("nearly impossible task of measuring money damages for an unproven technology"); *Pharmanetics, Inc.* v. *Aventis Pharms., Inc.*, 2005 WL 6000369, at *12-13, *16 (E.D.N.C. May 4, 2005), *aff'd*, 182 F. App'x 267 (4th Cir. 2006).

ST-246 was years away from FDA approval as of late 2006. It is impermissibly speculative to award damages based on the potential earnings of a drug that may ultimately never be approved.[20] While PharmAthene asserts that, since its lawsuit was filed, "the development of ST-246 has gone forward and is nearly done," PA's Op'g Br. at 43, PharmAthene is demonstrably wrong: [redacted]. Even as compared to other drugs, ST-246's approval is particularly speculative because it is a pioneer under the Animal Rule. AR83; AR565-66 (Rose); AR524 (Hruby); AR537-38 (Kessler). PharmAthene asserts that apart from "the eventual timing of sales," everything the parties anticipated in 2006 has come to pass. PA's Op'g Br. at 45. This is a profound overstatement. Although there is no real alternative to treat smallpox today, smallpox has been eradicated from the general population, and currently exists only for research purposes. The uncertainties identified by the Court of Chancery call into question ST-246's marketability, including the possibility that it may not generate any profits at all, or that it may never come anywhere close to achieving its potential, given the current economic climate. Ex. C, at *37.

PharmAthene attempts to argue there is no uncertainty by relying on its valuation expert, Jeffrey Baliban. PA's Op'g Br. at 37. But Baliban repeatedly admitted his testimony was based on speculative assumptions outside his expertise and whose truth he failed to investigate, even though he was required to do so. AR479, B3241, AR483-84, AR485, AR486-87, AR488, AR489 (Baliban); *see JRL Enters., Inc.* v. *Procorp Assocs., Inc.*, 2003 WL 21284020, at *8 (E.D. La. June 3, 2003). This was plain from the rest of his testimony.

x Baliban heavily relied on testimony by PharmAthene's FDA and regulatory expert, Dr. Peck, that there was a high likelihood ST-246 would receive FDA approval, without investigating the facts above. AR480 (Baliban). Yet Dr. Peck's conclusions were based on the erroneous assumption that [redacted]. *See Militrano*, 3 Misc. 3d at 540-41 ("No expert could honestly opine that [FDA] approval would have been granted without engaging in rank

[20] *Medco Research, Inc.* v. *Fujisawa USA, Inc.*, 1994 WL 719220, at *14 (N.D. Ill. Dec. 21, 1994) (calculating lost profits especially difficult "in light of the unpredictability of the FDA approval process"); *Militrano* v. *Lederle Labs.*, 3 Misc. 3d 523, 540-41 (N.Y. Sup. Ct. 2003), *aff'd*, 26 A.D. 3d 475 (2d Dep't 2006); AR544 (Kessler).

speculation. The approval process is accompanied by countless opportunities to decline or delay further progress.").

- x Baliban relied on PharmAthene's projections and assumptions, rather than on any independent analysis. AR108 ¶ 40, AR114 ¶ 53; B3241-42 (Baliban); AR578 (Dr. Keith Ugone, SIGA's damages expert).

- x Baliban relied on projections SIGA created outside the normal course of business and in order to support a negotiating position. They do not reflect the risk of full payment with no success. *See* B3306 (Fasman); AR578-79 (Ugone).

- x As the Court of Chancery specifically recognized, Baliban's valuations vary greatly in response to modest changes in input. Ex. C, at *37; AR573-74, AR580-81, AR576-77 (Ugone); B1293, 1297; B1376.

Indeed, Baliban set forth damage theories not only as of the date of breach, but also as of the trial date, even though, as the Court of Chancery correctly noted, "expectation damages are to be measured as of the date of the breach." Ex. B, at *13; Ex. C, at *37 n.224. Though subsequent events may confirm the state of affairs as of the time of the breach, PharmAthene cannot recover damages based on changed circumstances more than four years later. AR490-91 (Baliban); AR575 (Ugone). And Baliban's assumptions were demonstrably wrong. He assumed in his report that sales of ST-246 would begin in June 2008, or alternatively in 2010, B2526 ¶ 47; AR474, but no sales had occurred as of the time of trial in 2011. While PharmAthene claims that "[w]ith the sole exception of the eventual timing for sales, everything the parties expected in 2006 has essentially happened," PA's Op'g Br. at 45, this statement is also demonstrably wrong. Baliban suggested a possibility [redacted]

This is not a case like *Greka*, where expectation damages were readily ascertainable. In *Greka*, the Court of Chancery awarded the plaintiff its expectation (equal to its reliance) interest as measured by how "the parties themselves agreed to value [the defendant]'s obligations . . . as embodied in the Term Sheet." 2001 WL 984689, at *16. The cash value of the defendant's obligations under the term sheet was clear: 120% of the principal value of the note that the defendant had agreed to pay. By contrast, here nothing is clear about what, if anything, PharmAthene could have expected to receive: it is speculative what agreement, if any, the parties would have reached; it is speculative when, if ever, ST-246 will be approved; and it is speculative what, if anything, ST-246 may

eventually earn, much less what PharmAthene's share of that would have been had the parties' negotiations not broken down.

PharmAthene claims that it is somehow exempt from the rule against speculative damages because, "while proof of the fact of damages must be certain, proof of the amount can be an estimate, uncertain, or inexact." PA's Op'g Br. at 44 (citing *Agilent Techs., Inc.* v. *Kirkland*, 2010 WL 610725, at *29 n.271 (Del. Ch. Feb. 18, 2010)). This is true under circumstances not present here, but as the footnote PharmAthene cites for this point from *Agilent Technologies* also notes, "The general rule, followed in Delaware and elsewhere, is that future lost profits must be established by 'substantial evidence' and not by speculation." *Agilent Techs.*, 2010 WL 610725, at *29 n.271. Similarly, all of the other cases PharmAthene cites expressly state that the court may not set damages based on mere speculation. *Beard Research, Inc.* v. *Kates*, 8 A.3d 573, 613 (Del. Ch. 2010); *Henne* v. *Balick*, 146 A.2d 394, 396 (Del. 1958); *Cura Fin. Servs.* v. *Elec. Payment Exch., Inc.*, 2001 WL 1334188, at *20 (Del. Ch. Oct. 22, 2001).

PharmAthene attempts to retain its speculative relief by requesting that this Court award it an "alternative payment stream." PharmAthene is essentially requesting a royalty. The Court of Chancery correctly held in its decision on SIGA's Motion for Partial Summary Judgment that PharmAthene was not entitled to such a remedy because it is a patent measure of damages, and thus available only in patent infringement cases. Ex. B, at at *13; AR481-82 (PharmAthene counsel admitting PharmAthene asked its expert to calculate royalty damages after the Court of Chancery ruled them impermissible).

An alternative payment stream is also impermissible because, like the award by the Court of Chancery, it would require payments from SIGA to PharmAthene and would thus reverse the arrangement that was contemplated by the LATS and the Merger Agreement by placing PharmAthene in the role of licensor rather than licensee. Such a remedy is further improper because it would remove any risk that PharmAthene would have assumed in a collaboration with SIGA. While the LATS contemplated that PharmAthene would completely fund and participate in the development, regulatory approval process and sales of the drug, A86-87, the proposed remedy does not take into account the value of those services or allocate to PharmAthene any risk that the drug may not ever be profitable. Pl.'s Op'g Post-Trial Br. at 66 (noting that the "risk" PharmAthene will share with SIGA is only the risk that no profits may be realized, rather than actual outlay of cash).

Conclusion

The Court of Chancery's Orders and Final Order and Judgment entered May 31, 2012, should be reversed insofar as they held SIGA liable on PharmAthene's claims for breach of the obligation to negotiate in good faith and promissory estoppel and insofar as the Orders and Final Order and Judgment awarded any relief to PharmAthene. The Court of Chancery's Opinion and Order entered September 22, 2011, and its Final Order and Judgment should be affirmed insofar as they held SIGA not to be liable on PharmAthene's claims for specific performance of the LATS, declaratory relief that the LATS was binding, breach of contract, and unjust enrichment. Judgment should be entered for SIGA on all counts of the Amended Complaint.

Respectfully submitted,

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