



IN THE SUPREME COURT OF THE STATE OF DELAWARE

PHARMATHENE, INC.

Plaintiff Below,
Appellee/ Cross Appellant,

v.

SIGA TECHNOLOGIES, INC.,

Defendant Below,
Appellant/ Cross Appellee.

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No. 314, 2012 **PUBLIC VERSION**

On appeal from the Court of
Chancery of the State of
Delaware
C.A. No. 2627-VCP

**CORRECTED CROSS-APPELLANT PHARMATHENE'S REPLY BRIEF IN
SUPPORT OF ITS CROSS-APPEAL**

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In its Answering Brief and Opening Brief on its cross appeal (“Ph. Br.”) PharmAthene demonstrated that the Court of Chancery’s finding that SIGA acted in bad faith which is “the conscious doing of a wrong because of dishonest purpose or moral obliquity....” (Ex. C, at *22) was well supported by the trial record. PharmAthene also demonstrated that in fashioning its remedy in the nature of a constructive trust/equitable lien the Court of Chancery properly acted pursuant to its long-standing equitable powers.

However, if this Court should not affirm the remedy provided by the Court of Chancery, PharmAthene demonstrated that it was entitled to a payment stream based on the economic terms of the LATs. If this Court does not affirm the Court of Chancery’s judgment, PharmAthene also demonstrated that the LATs, once attached to the Bridge Loan and Merger Agreements, became a binding enforceable agreement and that, as a result, PharmAthene is entitled to (1) specific performance or (2) its expectancy damages. Alternatively, PharmAthene is entitled to damages under the doctrine of unjust enrichment.

REPLY TO SIGA’S COUNTER-STATEMENT FOR FACTS AS TO PHARMATHENE’S CROSS APPEAL

SIGA in its Opening Brief stated “[w]e present...the facts necessary to this appeal, as found by the Court of Chancery, except where otherwise noted.” (SIGA Br. at 4) As pointed out in PharmAthene’s brief, “[i]f SIGA’s factual presentation is compared side by side to the Court of Chancery findings they describe two very different cases.” (Ph. Br. at 5 n.3)

SIGA has continued its pattern of factual inaccuracies in its Reply Brief (“SIGA R. Br.”). Accordingly, it is necessary to respond to at least some of these inaccuracies.

1. “Further, PharmAthene contributed little to SIGA or the development of ST-246.” (SIGA R. Br. at 2)

The Court of Chancery specifically found:

In March 2006, PharmAthene began providing operational assistance to SIGA in areas such as regulatory activities, quality assurance, quality control, and government affairs to help develop ST-246. During the next several months, PharmAthene assisted SIGA, to varying degrees, with several events critical to the drug’s development. 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. SIGA likely paid for that service in whole or in part with proceeds from the bridge loan. Similarly, PharmAthene representatives were present and apparently answered some questions during a reverse site visit between SIGA and the NIH in July. Soon thereafter, in September 2006, the NIH awarded SIGA \$16.5 million for the development of ST-246.... Although PharmAthene may have overstated the importance of its contributions, I find that they were not immaterial, as SIGA suggests, and contributed to the success of ST-246 in 2006. (Ex. C, at *8; *see also* Ex. C, at *24, *27 n.144 (finding the expertise and services PharmAthene provided to be “valuable”))

2. “PharmAthene framed its proposal as a partnership. Because Richman’s goal from the start was not a license agreement but a merger. B3201 (Richman); B2571.” (SIGA R. Br. at 2)

While Richman did testify that he originally wanted a merger, he also testified, and the Court of Chancery found, SIGA insisted on negotiating a license agreement first and it was unwilling to discuss a merger until license terms were agreed upon because of the past failed merger attempt and its immediate need for money. (Ex. C, at *3) Richman also testified about why he used the word partnership, and it had nothing to do with wanting a merger. It was because Konatich said SIGA was looking for a collaboration partner:

Q: When you said they were looking for a partner, what did you understand from Mr. Konatich they were looking for?

A: I think they wanted some involvement. The word “partner” is used in business development – at least in biotechnology – in a very general sense...they wanted to continue to do the early stage work on the product.... (B3201 (Richman))

Importantly, the trial court also specifically found that the parties never contemplated a formal legal partnership, specifically noting:

[I]n 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)

3. “As Richman confirmed at trial, he contemporaneously understood the language ‘Non Binding Terms’ to signify that the terms of LATS was open for negotiation.” (SIGA R. Br. at 2)

This statement misrepresents Richman’s testimony. Importantly, what he testified to before that was “[t]hat’s what I’ve always done before sending out a term sheet...is to put non-binding on the term sheet.” (AR 554 (Richman)) He also testified that on January 19, he called Drapkin and told him the PharmAthene board had approved the term sheet with Drapkin’s changes and “the parties had a deal.” (B3206-07) Of course what is relevant is not the nature of the term sheet as it was being negotiated and revised by the parties but its purpose when the final version of the LATS was attached to and incorporated into both the Bridge Loan and Merger Agreements. The Court of Chancery found that “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)

4. “PharmAthene never sent SIGA a final version of the LATS, and PharmAthene’s board never approved it.” (SIGA R. Br. at 3)

To the contrary, the Court of Chancery found that PharmAthene sent SIGA the LATS on February 10, 2006 (Ex. C, at *5) and that “[t]he final merger term sheet, **as reviewed by the**

PharmAthene board on March 1, 2006, specifically referred to the LATs and included a copy of it as an exhibit.” (Ex. C, at *7) (emphasis added)

5. “The Court of Chancery correctly concluded that the parties never finalized the LATs. Ex. C, at *14.” (SIGA R. Br. at 3)

There is no such conclusion stated in Ex. C at *14 or anywhere else. All the Court of Chancery concludes on that page of its opinion is that “as of that date [*i.e.*, the January 26, 2006 date in the footer of the LATs] the parties did not intend the LATs to be binding.” (Ex. C, at *14) This hardly stands for the proposition that the LATs was not finalized or the terms were somehow open for further negotiation. To the contrary, the record clearly demonstrates that the LATs was highly negotiated by the parties and mutually agreed to in January 2006. Of course, what is relevant is the legal effect of attaching and incorporating the LATs (whose terms were unchanged after January 26, 2006) into two binding agreements - the Bridge Loan and Merger Agreements.

What the Court of Chancery did specifically find was 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), and that “[s]imilarly 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 in the event the parties failed to conclude the merger,**” (Ex. C, at *26)(emphasis added), and that the LATs contains all the economic terms the parties considered important. (Ex. C, at *19, *26)

SIGA cites references to PharmAthene’s internal documents referring to “negotiating” a license agreement (SIGA R. Br. at 3-4) after the LATs was finalized as evidence it was not final. These documents were prepared and dated all before the February 22, 2006 meeting with Drapkin when PharmAthene still wanted a formal license agreement. It was at that meeting that Drapkin convinced PharmAthene that it was not necessary to have lawyers draft a formal license agreement and that if the parties attached the LATs to the Bridge Loan agreement it would guarantee that PharmAthene would get a license for ST-246 in accordance with the terms of the LATs. (Ex. C, at *6; B3190-91 (Wright); B3210-11 (Richman); B3227-28 (Baumel))

6. “The draft LATs PharmAthene sent, dated January 26, AR 1, had few differences from the last version...but those differences were substantial.” (SIGA R. Br. at 4)

It is hard to understand what point SIGA is trying to make here but if it is trying to suggest that the final version of the LATs contained differences from a prior version as to which the parties disagreed, that suggestion is false. On the contrary, the Court of Chancery found that on January 17 Drapkin spoke to Richman and requested two changes and told Richman that if PharmAthene made the changes “we have got a deal on the term sheet....” (Ex. C, at *4) 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. B17-18 shows the Drapkin changes Richman added to B14. (Ex. C, at *4 n.26) The Court of Chancery found: “the call between Richman and Drapkin did occur and that Drapkin did request the two changes Richman identified.” (Ex. C, at *4)

7. “[T]he LATs attached to the final MTS [*i.e.*, merger term sheet] included the language ‘Non-binding Terms.’ AR20-21. Although Richman and Wright claimed the ‘Non-Binding’ footer was included in error, AR 584 (Wright); AR 556 (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....” (SIGA R. Br. at 5)

This is a mischaracterization of Baumel's testimony and of the court's opinion. Baumel testified:

Q: Was it a mistake not to remove those terms? [the Non-Binding footer]

A: I believe not.

Q: Why not?

A: Well, this – well for one thing, we were instructed by the parties to attach the term sheet, as it was last negotiated, to the agreement. And that's what this is.

Second, the agreement provides that the parties would negotiate a license agreement in accordance with the terms provided for in the term sheet. This is a dateline footer. It is clearly not a term of the term sheet. I see this – we see this kind of language in term sheets all the time, and it's clearly not a term of a license agreement.

Q: Well, did there come a point in time when you believed that the parties were legally bound to negotiate and execute a license agreement in accordance with the – that contained the business terms within this license agreement term sheet [LATS]?

A: Clearly, at the time that the bridge purchase agreement was executed.... (B3230 (Baumel); Ex. C, at *16 n.100-01)

Further, the Court of Chancery stated that “because the date of the legend never changed and there is no evidence that the parties specifically discussed the legend, I accord it only limited weight.”¹ (Ex. C, at *16) The Court of Chancery went on to state:

...I do not consider the “Non-Binding Terms” legend to be inconsistent with the obligation of the parties to negotiate in good faith about executing a license agreement in accordance with the terms of the LATS. In particular, I reject as not supported by the evidence the position of SIGA and Drapkin that it represented simply a nonbinding “jumping off point” for a discussion about a license agreement.... (Ex. C, at *16 n.103)

8. “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.” (SIGA R. Br. at 6)(emphasis added)

This statement is factually incorrect. The MTS (*i.e.*, the merger letter of intent) signed by the parties on March 10, 2006 initially contemplated that the parties would *execute* a definitive Merger Agreement by April 24, 2006. (B455) The Merger Agreement was, in fact, signed a few weeks later than initially anticipated on June 8, 2006. (B541) However, at Drapkin's insistence, the Merger Agreement had a very aggressive “drop dead” closing date of September 30, 2006. It was this date

¹ Nowhere does the court say it rejects Wright's and Richman's testimony. In fact, the court noted that “Richman avers that he typically removes similar footers only when sending an execution version of a term sheet, but did not do so with the LATS because it was attached to another document that was signed.” (Ex. C, at *16 n.100)

that Drapkin promised to extend if the parties needed extra time to close the merger. Because of delays at the SEC in approving SIGA's merger proxy statement, in September 2006 PharmAthene asked for an extension of the September 30 closing date. Drapkin and SIGA, breaking Drapkin's promise, refused to grant an extension. (Ex. C, at *8, *9)

9. "[T]he 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...." (SIGA R. Br. at 7)

According to SIGA's written statements at the time, ST-246 was not still at an early stage of development in the fall of 2006. SIGA's view of ST-246's progress in November 2006 is laid out in detail by its Chief Scientific Officer, Dr. Hruby, in his September 27, 2006 email (B1843) and his October 4, 2006 presentation to SIGA's board. (B1849) The email started by saying that in the last few months "major" progress had been made on ST-246 product development noting:

- 1) We have completed [REDACTED]
- 2) We have completed a [REDACTED]
- 4) We have done a [REDACTED]
- 6) We have a [REDACTED]
- 9) We have received a [REDACTED]

Bottom line is the product's entire development is supported, we have all the necessary partnership and advocates in place, and we have the team in place to see it through. Estimated time to file NDA [for approval of ST-246 at the FDA] is Q408."
(B1843)(emphasis added)

10. "The market potential of ST-246 is not ascertainable." (SIGA R. Br. at 8)

Again, the record in this case belies this statement. On November 27 and 28, 2006 a series of emails were exchanged among key SIGA and M&F personnel - Fasman, Drapkin, Dugary, Mjalli and others. (See, e.g., B1955; B2031; B2040; B2280) Fasman's initial email has attached a comparison of PharmAthene revenue projection assumptions for ST-246 and SIGA's projection assumptions. (B1956) His cover email says "all of the individual assumptions are easily justified, and the result shows \$3 billion valuation for SIGA-246...." (B1955) [REDACTED]

REDACTED

Also, as the Court of Chancery found “[i]n October 2010, BARDA informed SIGA of its intention to award it the contract under the RFP, with estimated revenues of approximately \$2.8 billion if all options were exercised. A subsequent challenge by an unsuccessful competitor for the contract resulted in a finding that SIGA did not qualify for small business status; that decision was on appeal at the time of trial. Even if the appeal fails, however, BARDA could resolicit proposals....” (Ex. C, at *11)

REDACTED

In fact, in a series of investor calls in 2009 and 2010 Dr. Rose, SIGA’s CEO made the following points:

- BARDA can procure biodefense countermeasures before they are FDA approved. (B2265)
 - FDA approval is not the point at which our commercialization begins. Our commercialization begins with the completion of a contract with BARDA. (B2265)
 - The initial 1.7 million treatments is really just the tip of the iceberg. (B2268-69)
 - The successful delivery of the first batch of product to BARDA will open the door to discussions with other governments outside the U.S. (B2269)
 - SIGA has at least a three year lead compared to any other potential product candidate in regard to non-human primate efficacy testing. (B2260)
 - SIGA has had strong indications of interest on the part of other markets outside the U.S. and is proceeding ahead in parallel with the European regulatory authorities. (B3155)
 - ST-246 has been granted orphan medical product designation in Europe which provides for 10 years of market exclusivity, similar to orphan drug status in the U.S., which provides 7 years of market exclusivity. (B3703 (Rose))
11. “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....” (SIGA R. Br. at 11)

First, SIGA offers no citations to the record in this case to support the claim that this would be “a bargain price.” The reason for that is there is none. In fact the only evidence introduced at trial was that the economic terms of the LLC were outrageous, even without considering the LATs. As Mark Edwards, PharmAthene’s biotechnology licensing expert, concluded in the Edwards Report:

“[I]t is my opinion that the consideration and structure of the [LLC] Agreement varies significantly, to the detriment of PharmAthene and

to the benefit of SIGA, from the consideration and structure that are normal and customary in biopharmaceutical commercialization agreements involving compounds similar in stage of clinical development to ST-246 at the time of the[LLC] agreement.” (B2077-78)

This conclusion was based not only on Edwards’ extensive personal experience in being involved in at least 300 biotechnology collaboration negotiations over the five years prior to submission of his initial report, but also an extensive market evaluation of the actual terms of finalized biotechnology collaborations for drugs at a similar stage of development as ST-246. (*See also* B2077)

Edwards testified at trial that many of the provisions of the LATS were “eye-popping,” “highly atypical,” “highly unusual,” and “draconian.” (B3695-97 (Edwards)) As Edwards’ report notes, the LLC, in addition to the outrageous economic terms, contained extremely one-sided non-economic terms that greatly favored SIGA. (B3694-98 (Edwards)) In fact, the Court of Chancery found that:

In addition, several 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 under certain conditions, with PharmAthene having no right to cure and with all rights to the product reverting to SIGA. (Ex. C, at *10)

12. “SIGA’s proposal was a first offer....” (SIGA R. Br. at 11)

First, it was not a first offer. SIGA made its first offer at the November 6, 2006 meeting where Fasman proposed an upfront payment of \$40-45 million and a 50/50 profit split. (Ex. C, at *10) SIGA then revised its offer when it sent PharmAthene its proposed LLC, which had economic terms substantially less favorable to PharmAthene than even its first proposal and ignored all the terms of the LATS. For instance, the LLC provided for \$100 million upfront payment and an additional \$235 million of milestone payments, along with royalty payments more than double those in the LATS. (Ex. C, at *10) SIGA never budged from this second position, even in light of PharmAthene’s offer to consider a 50/50 profit split. In fact, as the Court of Chancery found, SIGA’s counsel “Coch issued an ultimatum 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....’ On December 20, 2006 PharmAthene commenced this action.” (Ex. C, at *10)

CROSS-APPELLANT PHARMATHENE'S REPLY
ARGUMENT ON ITS CROSS-APPEAL

I. PharmAthene Is Entitled To An Alternative Payment Stream Based On The Terms Of The LATs

PharmAthene believes the Court of Chancery acted properly in fashioning its remedy and fully supports that remedy. *See Americas Mining Corp. v. Theriault*, 2012 WL 4335192, at *33 (Del. Aug. 27, 2012)² (“The Court of Chancery has the historic power to grant such...relief as the facts of a particular case may dictate.”). However, PharmAthene submits that if this Court disagrees, a payment stream in accordance with the terms of the LATs would be appropriate.

There is no question that PharmAthene has been significantly damaged and SIGA enriched by hundreds of millions if not billions of dollars by SIGA’s “egregious” bad faith conduct. In fact the Court of Chancery specifically stated that “[i]n this case, reliance damages in the narrow way SIGA defines them would be on the order of a few hundred thousand dollars – basically *de minimis* – in the context of the billion dollar business opportunity at issue.” (Ex. C, at *35)

The very cases and principles that the Court of Chancery relied upon in adopting the remedies of constructive trust/equitable lien (*see* Ex. C, at *38-42; Ph. Br. at 29-35) also support awarding PharmAthene a payment stream based on the economic terms of the LATs. *See also*, Restatement (Third) of Restitution §39(1)(“If a deliberate breach of contract results in profit to the defaulting promisor and the available remedy affords inadequate protection to the promisee’s contractual entitlement, the promisee has a claim to restitution of the profit realized by the promisor as a result of the breach. Restitution by the rule of this section is an alternative to a remedy in damages.”).

At trial PharmAthene produced evidence of what such a payment stream would be. Baliban (PharmAthene’s economic expert) calculated that based on what was known as of December 2006, the date of the breach (Basis 1), the payment of 56% of the gross revenues of ST-246 would give PharmAthene the economic equivalent of the LATs. (B2534 ¶68; B1309-10 ¶50; B3668-69) In Baliban’s Supplemental Report dated April 15, 2010 (B1501) based on “quantity, timing, price and cost assumptions...on what [was] known...as of April 15, 2010” (Basis 2), payment to PharmAthene of 48% of the gross revenues on sales of ST-246 would give PharmAthene the economic equivalent of what it would have received under the terms of the LATs. (B1504 ¶4; B1512 ¶20)³

A remedy of this nature would mitigate any uncertainty around the future sales of ST-246 since the amount of the payments to PharmAthene would vary based on the amount, timing, and price of ST-246 sales and PharmAthene would bear those risks with SIGA.

SIGA argues that PharmAthene is “not entitled to such a remedy because it is a patent measure of damages, and thus only available only in patent infringement cases.” (SIGA R. Br. at 34) First, this remedy is not the remedy created by statute for patent infringement. In patent infringement cases a reasonable royalty is determined by what a willing buyer and a willing seller would have arrived at in an arms length negotiation. *See Honeywell Int’l, Inc. v. Hamilton Sundstrand Corp.*,

² This case was not cited in PharmAthene’s Brief because it was decided one day after that brief was filed.

³ If the Court is uncomfortable with a percentage of revenue approach, it could remand to the trial court to come up with a final order specifying the terms of a payment stream that reflects the economic terms of the LATs. As the LATs provides for a 50/50 profit split on sales to the U.S. government, those terms are already embodied in the current final order of the trial court, and it would be relatively straight forward to revise the order to address the royalty payment provisions.

378 F. Supp. 2d 459 (D. Del. 2005). Here, PharmAthene is not seeking a payment stream based on what a buyer and seller would have agreed on but rather a payment stream that will give it the economic equivalent of the LATs itself.⁴ Even more importantly, this remedy is completely consistent with this Court's holdings on the nature and function of a constructive trust.

[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.**

Adams v. Jankouskas, 452 A.2d 148, 152, 152 n. 4 (Del. 1982)(emphasis added).

'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.'

Hogg v. Walker, 622 A.2d 648, 652 (Del. 1993)(quoting *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380 (1919)(Cardozo, J.)). See also, *ID Biomedical Corp. v. TM Tech., Inc.*, 1995 WL 130743, at *13, *16-17 (Del. Ch. Mar. 16, 1995)(constructive trust applied in a bad faith breach of contract case); *Envo, Inc. v. Walters* 2009 WL 5173807, at *3, *8 (Del. Ch. Dec. 30, 2009); *Ciappa Constr., Inc. v. Innovative Prop. Res., LLC*, 2007 WL 914640, at *1 (Del. Super. Mar. 2, 2007); *Solow v. Aspect Res., LLC*, 2004 WL 2694916, at *6 (Del. Ch. Oct. 19, 2004); *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.").⁵

⁴ This distinction was specifically pointed out by counsel at trial. (AR 481-82 (Baliban))

⁵ Also prior to adoption of 35 U.S.C. § 284, providing for a reasonable royalty in patent infringement cases, the courts applied the common law equitable doctrine of constructive trust on the infringer's profits. *W.L. Gore & Assocs., Inc. v. Carlisle Corp.*, 1978 WL 21430, at *3 (D. Del. May 17, 1978); *Triplex Safety Glass Co. v. Pittsburgh Plate Glass*, 38 F. Supp. 639, 641 (D. Del. 1941).

II. 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. The LATs is an enforceable contract

The parties intended to be bound by the terms of the LATs.⁶ Section 12.3 of the Merger Agreement 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 Agreement Term Sheet [LATs]. (B615)

The Court of Chancery found that “[t]he 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.... [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)

If this Court does not affirm the Court of Chancery’s finding, then the language of Section 12.3 of the Merger Agreement (as well as Section 2.3 of the Bridge Loan Agreement) can have only two other possible meanings. The first is that it means exactly what it says – that the parties intended to be bound by the terms of the LATs. The only other possibility is SIGA’s implausible position presented at trial and on this appeal that the terms the parties negotiated at length, memorialized in the LATs, and on which PharmAthene relied in providing crucial capital and other assistance to SIGA, were meaningless and did not have any legal effect whatsoever.

PharmAthene’s Brief pointed out the plain dictionary meaning of “accordance,” which is “agreement; conformity; in accordance with your instructions.” *American Heritage College Dictionary* (44th ed. 2002). SIGA did not respond to this in its reply brief because there is no persuasive response. Therefore, the plain meaning of Sections 12.3 and 2.3 is that the parties would negotiate with the intention of executing a license agreement in conformity with the LATs.

Since the plain meaning of the provisions cannot be disputed, SIGA tries to argue that the words do not mean what they say by pointing to other provisions of the Agreements, which in no way conditioned or limited the above obligation. The law in Delaware is clear that contracts are to be read “as a whole” to “give each provision and term effect, so as not to render any part of the contract mere surplusage.” *The Estate of Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010). *See also, Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992); *Gillenardo v. Connor Broad. Del. Co.*, 2002 WL 991110, at *7 (Del. Super. Ct. Apr. 30, 2002); *Asten, Inc. v. Wangner Sys. Corp.*, 1999 WL 803965 (Del. Ch. Sept. 23, 1999).

SIGA argues that because (a) the loan made under Bridge Loan Agreement had a maturity date and PharmAthene had a security interest in SIGA’s assets, and (b) the Merger Agreement had a 90 day exclusive negotiating period, that somehow alters the plain meaning of Sections 12.3 and 2.3 and that the heavily negotiated terms of the LATs are meaningless and in no way bound the parties. However, there is an obvious interpretation of these provisions which is completely and logically

⁶ Because PharmAthene’s appeal is based on the language of the Bridge Loan and Merger 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).

consistent with the overall intent and meaning of the Bridge Loan and Merger Agreements. As Baumel testified, when you make a loan you always have a maturity date. (B3677 (Baumel)) (confirming a three year maturity date “because a -- a promissory note has to have a due date.”)

Also, a security interest in SIGA’s assets, especially ST-246, was essential because SIGA was out of money, and it was PharmAthene’s key goal once it loaned SIGA the funds it so desperately needed and provided operational assistance, that PharmAthene was going to end up with exclusive control of ST-246 in all circumstances, including if SIGA defaulted on repayment of the loan, failed to close on the merger, or failed to negotiate in good faith a more detailed license agreement incorporating the terms of the LATs. The maturity date and security interest were necessary to protect against such contingencies. Section 2.3 of the Bridge Loan Agreement also made clear that the obligation to negotiate a license agreement in accordance with the LATs was independent of any other obligations in that agreement, including repayment of the loan.

Second, the 90 day exclusive period was intended to protect against a third party interfering with finalizing a more detailed license agreement and causing SIGA to breach its obligation to negotiate and execute a license in accordance with the terms of the LATs. Given that the parties had agreed to all the essential terms of a license, PharmAthene’s reasonable expectation was that getting to a more detailed license agreement would take very little effort.

Q: ...Did you -- were you the one who asked to have that provision in there? [90 day exclusive period]

A: Actually, I was.

Q: Why was that?

A: The reason for that is that **we had very little to get done. We needed a very short period of time.** All the major business terms had been agreed to. And the last thing we needed was for another corporation to come in and make an unsolicited offer and cause all sorts of complications in getting this done. (B3192-93 (Wright))(emphasis added)

Again, interpreting the purpose of these provisions as described above gives Sections 12.3 and 2.3 meaning consistent with their language. Interpreting them as SIGA proposes makes Sections 2.3 and 2.3 meaningless. That is not how contracts are interpreted under Delaware law. *See Osborn v. Kemp, supra* at 10, and the other cases cited.

Next, SIGA claims there is no record that PharmAthene’s board approved the LATs. The LATs was approved by the PharmAthene board on January 18, 2006. (Ex. C, at *5) The Court of Chancery found that Baumel, who drafted the minutes, “credibly testified, however, that the lack of mention of the term sheet [in the January 18 board minutes] stemmed from his practice of only including such documents in the minutes at the time they were signed.” *Id.* The Court also found that on January 19, Richman called Drapkin and told him the board had approved the term sheet with Drapkin’s requested changes. *Id.* The Court of Chancery noted that when Richman was asked why he did not send the LATs to Drapkin until February 10 it was because “Drapkin did not ask for one and that he assumed that Drapkin already had made the [two final] changes in his own version.” *Id.* When the parties agreed to sign a document (the MTS with LATs attached), the Court of Chancery found that the PharmAthene March 1, 2006 board minutes stated the MTS with LATs attached was reviewed and approved by the board. (Ex. C, at *7; B445)

SIGA argues that the parties agreed to “negotiate” and not “execute” a license, and thus it was free to propose any terms it wanted. It is hard to understand what point SIGA is trying to make. If the parties agreed to negotiate a license with the terms of the LATs there was no need to say execute. However, Sections 12.3 and 2.3 make it abundantly clear the parties were required to do much more than simply start a negotiation as if there were a clean slate. Specifically, they were bound to “negotiate in good faith **with the intentions of executing** a definitive License Agreement in accordance with the terms set forth in the [LATs].” (B476; B615)(emphasis added)

SIGA contends, inaccurately, that Baumel testified that he “left the Non-Binding Terms legend on the term sheet because that was the agreement of the parties.” (Citing Ex. C, at *16) What Ex. C at *16 says is that the court gives the Non-Binding legend “only limited weight.” With respect to Baumel the Chancery Court opinion only quotes him as follows:

(“[W]e were instructed by the parties to attach the term sheet, as it was last negotiated, to the agreement”) 387 (“The parties intended the last term sheet that had been negotiated between the parties to be attached to the agreement” and “[t]he legend is on the piece of paper...”) (Ex. C, at *16 n.101)

See also Statement of Facts, *supra* at 6-7, (noting Baumel testimony about the legend being simply a “dateline footer” that was “clearly not a term of the term sheet” and that the parties were legally bound to negotiate and execute a license agreement in accordance with the business terms of the LATs “at the time that the bridge purchase agreement was executed....”).

Finally, at the very end of his testimony the following exchange took place between the Chancery Court and Baumel:

Q: [the court] -- do you have an opinion one way or the other? I mean, is it just your understanding as a person who was involved as to whether there were any binding obligations on...SIGA with respect to anything they had to do regarding the license arrangement provision?

A: Clearly they had an obligation to negotiate in good faith in accordance with the term sheet that was attached. (B3678 (Baumel))

Accordingly, reading the contracts as a whole to “give each provision and term effect, so as not to render any part of the contract mere surplusage,” *Osborn*, 991 A.2d at 1159, the parties did not intend the LATs to be meaningless but intended to be bound to enter into a license agreement in accordance with its terms. Furthermore, as PharmAthene was clear and consistent about its interpretation of these agreements and SIGA never expressed a contrary view, pursuant to the forthright negotiator principle, SIGA is estopped from contesting this interpretation. *United Rentals v. RAXN Holdings, Inc.*, 937 A.2d 810, 835 (Del. Ch. 2007)(“Under this principle, the Court considers the evidence of what one party subjectively believed the obligation to be, coupled with evidence the other party knew or should have known of such belief.”); *Comrie v. Enterosys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. 2003).

B. The LATs contains all of the essential terms of the parties’ agreement

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) In fact the LATs specifies, among other things,⁷ the product to be licensed (ST-246 and any other orthopox related small molecules, etc.), the territory (worldwide), the patents at issue, know how, materials, licenses (a worldwide exclusive license for the term of the patents with the right to grant sublicenses), an R&D Committee with specified tasks assigned to SIGA and PharmAthene and with PharmAthene to hold the IND (Investigational New Drug Application) and NDA (New Drug Application to the FDA),⁸ that PharmAthene is obligated to fund SIGA's research, the initial license fees, which totaled \$6 million, the milestone fees totaling \$10 million and when they were due, and royalties: 8% on sales under \$250 million, 10% on sales over \$250 million and 12% on sales over \$1 billion. Further, with respect to product sales to the U.S. government only, the LATs also provided for a 50/50 profit split to the extent net margins exceeded 20%. (B21-22)

No additional terms needed to be in the LATs for it to be enforceable. A contract is not rendered unenforceable by the absence of terms that are not necessary to enforcement. *See Dittrick v. Chalfant*, 948 A.2d 400, 408 (Del. Ch. 2007)(specifically enforcing agreement for sale of land, stating that "while the parties themselves must agree on the essential terms, a court will not upset an agreement where an indefinite provision is not an essential term.") *See also, Rizzo v. Joseph Rizzo & Sons Constr. Co.*, 2010 WL 1067295, at *3 (Del. Ch. Mar. 12, 2010)(in decreeing specific performance, the court stated that "[t]he enforceability...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's 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."); *Asten, Inc. v. Wangner Sys. Corp.*, 1999 WL 803965, at *7 (Del. Ch. Sept. 23, 1999).

Further, as the Court of Chancery correctly noted, the test of determining whether a missing term is material 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, 1286 (Del. Ch. 2004)(emphasis in original)

In *Parker-Hannifin Corp. v. Schlegel Electr. Materials, Inc.*, the court held that an enforceable contract is formed when "all of the terms that the parties themselves regard as important has been resolved" and Parker's conduct during drafting belied its claim that the missing terms were essential. 589 F. Supp. 2d 457, 462-63 (D. Del. 2008). At no time prior to or after execution of the Bridge Loan and Merger Agreements up through termination of the Merger Agreement did any SIGA representative suggest to any PharmAthene representative (or any third party for that matter) that any essential term was missing from the LATs. SIGA had ample opportunity to raise matters of concern regarding the terms of a license during the parties' extensive negotiations over the LATs and, as the trial court noted, as a result of those negotiations, the parties "contested and compromised" on the key terms of the LATs. (Ex. C, at *22) SIGA's failure to raise such concerns

⁷ SIGA still contends that other provisions were "required to create a viable partnership between PharmAthene and SIGA." (SIGA R. Br. at 25) The Court of Chancery rejected the argument that the parties ever contemplated entering into a partnership. (Ex. C, at *26 n.140)

⁸ These gave PharmAthene control of the regulatory process. (B3710 (Richman); B3705 (Hruby); B3681 and B3683-84 (Peck))

then should not provide a basis for claiming now that the LATs does not contain all the terms the parties objectively thought were essential to a license.

The expert testimony offered at trial on this issue provides further support that from an objective point of view the LATs contained all essential terms of a licensing agreement for ST-246. Edwards⁹ testified that he reviewed the LATs and compared it to other agreements in the biotechnology industry for synthetic compounds like ST-246 at the same state of development to determine if it contained material terms that are normal and customary in the industry. He also compared the LATs to three other binding term sheets filed with the SEC and concluded: "It is my opinion that the content of the LATs is normal and customary for a material agreement between two parties in the biotechnology and pharmaceutical industries." (B2069, n.11; *see also* B3699-3700 (Edwards) (noting that "a negotiator, looking at [the LATs], would not say 'Ah, I'm missing something important.'"))

Edwards then identified six additional binding letters of intent agreements comparable to the LATs. (B3674) Like the LATs, the majority of those other agreements do not address many of the terms SIGA claimed are material to a license agreement or partnership, including diligence, timetable obligations, indemnification, competing products,¹⁰ patent prosecution and litigation, confidentiality,¹¹ ownership and licensing of new technology, or commercialization program particulars. 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.¹² And unlike the LATs, several of the agreements do not address sublicensing. Nevertheless, each by its own terms is a binding agreement.

The Court of Chancery distinguished these agreements on the grounds that each was signed and labeled as binding. (Ex. C, at *17 n.107) First, this is not a relevant distinction because the Bridge Loan and Merger Agreements were signed and Sections 2.3 and 12.3 made the terms of the LATs binding. Second, the point of referencing the letter of intent agreements was to help identify which terms are essential in a biotechnology licensing context like we have in this case. Here, these agreements with far fewer terms than the LATs were binding.

Consistent with *Loppert* and *Parker-Hannifin*, here "a reasonable negotiator would not interpret the parties' dialogue in a manner other than as creating an enforceable agreement, even though the parties had not agreed on...certain 'boilerplate' terms." (Ex. B, at *8) Accordingly, the LATs is enforceable as a contract and SIGA is liable for its breach. In this case, specific performance is the appropriate and fair remedy for SIGA's willful bad-faith breach. *See also*,

⁹ Edwards has been involved in over 300 negotiations over the past five years prior to submission of his report. Edwards has overseen the creation and maintenance of a database that has over 20,000 agreements in the biotechnology and pharmaceutical fields that have been filed with the SEC. For a more detailed description of Edwards' credentials, *see* B2054-55, ¶¶6-10.

¹⁰ Pursuant to the exclusive license granted to PharmAthene under the LATs, SIGA would be precluded from making, using, or selling competing products that fall within the claims of the patents covered by the LATs. So, the LATs does, in effect, contain terms addressing competing products.

¹¹ The parties had already agreed to confidentiality terms. *See* Section 13.2 of the Merger Agreement which provides in pertinent part: "the Confidentiality Agreement dated December 1, 2003 between SIGA and PharmAthene, a copy of which is attached hereto...shall remain in full force in accordance with its terms." (B617)

¹² SIGA points out that Hruby was concerned about the governance of the R&D Committee. First, Hruby testified that his role was one of scientific advisor and that he "did not have the capability of negotiating a term sheet." (B3284) Second, the parties' responsibilities were ultimately laid out in great detail in the final LATs.

Inamed Corp. v. Kuzmak, 275 F. Supp. 2d 1100, 1123 (C.D. Cal. 2002)(“Such a review reflects that items such as license termination, indemnification, sublicenses, transfer of rights, confidentiality, and dispute resolution were not mentioned during the course of the negotiations. The terms of the license without such provisions are ‘sufficiently definite’ that a court could determine whether the license had been breached and what an appropriate remedy for the breach would be.”); *Naime v. Cytozyme Lab.*, 174 F. 3d, 1104, 1111-12 (10th Cir. 1999); *Bradner v. Stelnick*, 1997 WL 177423, at *2 (Wis. App. Apr. 15, 1997).

C. PharmAthene is ready, willing, and able to perform

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. (B3664 (Richman)) Accordingly, it cannot be disputed that PharmAthene is “ready and willing” to perform under the terms of the LATs.

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. Specifically, Richman described at trial PharmAthene’s significant development capabilities, in contrast with SIGA’s limited capabilities in that regard. (B3200 (Richman)) Wayne Morges catalogued PharmAthene’s Quality capabilities as well as his own extensive drug development experience (B3232-33 (Morges)), while Valerie Riddle testified as to PharmAthene’s extensive experience dealing with the transfer of government contracts to PharmAthene as well as PharmAthene’s extensive experience taking over and managing subcontractors, which Rose acknowledged, SIGA relies upon for its manufacturing for ST-246. (B3709 (Riddle); *see also* Ph. Br. at 43)

D. The equities strongly weigh in favor of PharmAthene

In its attempt to claim that specific performance is not warranted in this case, incredibly SIGA tries to turn the analysis on its head and claim that the equities actually favor SIGA because “SIGA efforts, not PharmAthene’s, are responsible for ST-246’s success.” (SIGA R. Br. at 27) This position is simply absurd. The Court should reject the argument that SIGA’s “sweat equity” justifies its maintaining control of a drug that it has retained through bad faith, as that situation simply creates a perverse incentive for a wrongdoer like SIGA to breach its obligations, invest in the product, and then claim the innocent non-breaching party should not get a meaningful remedy because it would be “unfair” to the bad faith breaching party that the non-breaching party did not contribute to the product. In fact, under SIGA’s reasoning, any party that refuses to perform under a contract before the non-breaching party has started to perform or otherwise has devoted substantial effort under the contract should only be liable for nominal damages.¹³

¹³ *Cf. Nakahara v. NS 1991 American Trust*, 718 A.2d 518, 524-25 (Del. Ch. 1998)(discussing concept of “incentive-compatible legal rules” and “perverse incentives” in context of unclean hands doctrine and refusing to “create an effective option for litigants to fall prey to inequitable tendencies”). Any argument regarding SIGA’s alleged development efforts are utterly irrelevant, as the parties entered into a valid, binding agreement. In *Caterpillar Inc. v. Sturman Indus.*, 2006 WL 1582460 (C.D. Ill. June 7, 2006), the sole issue before the court was whether the equities favored specific performance of an agreement to assign patent rights to environmental technology. The sellers, the Sturmans, argued that to deprive them of the technology would be catastrophic. The court expressly rejected this argument, stating that the investments made by the Sturmans could not “change the findings of the jury, the law of the case, or applicable precedent.” *Id.* at *6. The court held that despite any alleged

Of course here it was PharmAthene – when SIGA was “treading water” and on its last legs – that provided crucial financial and operational support that kept the company and product alive. Not Donald Drapkin. Not M&F. In addition, SIGA has not had to take any real risk here, as the development of ST-246 has been performed by subcontractors whose efforts have almost completely been funded by the U.S. government, with a profit portion to SIGA built into the contracts and grants. (Ex. C, at *41)

Based on the factual record developed at trial, relevant authority establishes that the equities weigh in favor of specific enforcement of the LATs because of SIGA’s persistent and pervasive inequitable conduct. See *Szambelak v. Tsipouras*, 2007 WL 4179315, at *7-8 (Del. Ch. Nov. 19, 2007); and *PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1014-16 (Del. Ch. 2004)(court specifically enforced terms of buy/sell contract, relying on one party’s (Lehman’s) breach of the duty of good faith and fair dealing by refusing to close “by stating unequivocally that it would perform only on terms different than those required by...[the] agreements.”) SIGA’s argument is basically that of a man convicted of murdering his wife who pleads for mercy on the grounds that he is a widower.

hardships, equity could not permit the Sturmans to “avoid their obligations” under a valid and enforceable agreement. *Id.* at *7.

III. Alternatively PharmAthene Is Entitled To Recover Damages Under The Doctrine Of Unjust Enrichment

On its cross-appeal, PharmAthene contends that if the judgment below is not affirmed, then it is entitled to relief under the doctrine of unjust enrichment. The Court of Chancery found that each of the five elements of the claim were satisfied but declined to award relief because “it would not lead to different or additional relief” to that granted on the breach of contract and promissory estoppel claims. (Ex. C, at *29)

The Court of Chancery did raise the “covered by contract” defense *sua sponte* as part of its analysis of the unjust enrichment claim (but not the promissory estoppel claim). SIGA now concedes that it never raised this “covered by contract” defense in the court below, either as to unjust enrichment or promissory estoppel, offering various excuses why it failed to do so.¹⁴

The rationale for this defense is that unjust enrichment (like 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)¹⁵ But that is not what PharmAthene is seeking here.

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 as 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 more detailed license agreement, and agreed upon the terms of their bargain. But, SIGA cannot have it both ways, *i.e.*, that there was *no* binding contract with the license terms and unjust enrichment cannot apply because there *was* such a binding contract.

In contrast, and consistent with PharmAthene’s view here, *RGC Int’l Investors, LDC v. Greka Energy Corp.* upheld a promissory estoppel claim based on the breach of a *contractual* obligation to negotiate in good faith. Although not reaching the issue whether the other, substantive terms of the Term Sheet constituted an enforceable contract, the court found that the “Term Sheet [at least] gave rise to an enforceable obligation on Greka’s part to negotiate in good faith on an expedited basis.” 2001 WL 984689, at *13 (Del. Ch. Aug. 22, 2001). This contractual obligation was

¹⁴ SIGA’s reply brief argues (for the first time) that it did not know that PharmAthene was relying on the promises to negotiate found in the Bridge Loan and Merger Agreements and because SIGA allegedly was “not on notice” of PharmAthene’s reliance on these contractual promises SIGA was not required to assert this defense. (SIGA R. Br. at 15-16) In fact, SIGA knew well that PharmAthene was relying on these promises in the Bridge Loan and Merger Agreements, having specifically attacked them as being insufficiently clear and unambiguous to support a promissory estoppel claim. As described by the Court of Chancery, in moving to dismiss the promissory estoppel claim, SIGA argued that “neither the Bridge Loan nor the Merger Agreement provides the requisite clear and unambiguous promise, because both agreements require only that the parties negotiate toward a license agreement” (Ex. A, at *17) SIGA’s Pretrial Brief repeated this attack on the promises in the two contracts as being insufficiently clear and unambiguous to support the promissory estoppel claim. (A958)

SIGA also argues that it could not raise this contract defense until after the Court of Chancery found that under the Bridge Loan and Merger Agreements there was a binding obligation to negotiate the terms of the definitive license agreement. (SIGA R. Br. at 16) But, there was no reason why SIGA could not argue (although it would be without merit) that if the Court of Chancery were to find that the promises to negotiate in the Bridge Loan and Merger Agreements were binding contractual commitments, then this finding should preclude the promissory estoppel and unjust enrichment claims.

¹⁵ In each of the cases, parties had entered into a substantive contract and the party asserting promissory estoppel was seeking to vary the terms of that contract.

the basis for the promissory estoppel holding. The result should be no different here where unjust enrichment is at issue.

SIGA contends that PharmAthene's operational assistance cannot support the unjust enrichment claim because PharmAthene allegedly failed to proffer evidence as to the value of that contribution, that PharmAthene expended no more than a minimal sum, or that there was no causal connection between the assistance and an increase in value of ST-246. (SIGA R. Br. at 30) The Court of Chancery made a factual finding to the contrary, holding that: "PharmAthene has demonstrated that SIGA was enriched, to some degree, by that [operational] support, [and thus] the first element of unjust enrichment [enrichment] is satisfied." (Ex. C, at *27) *See also Cura Fin. Servs. v. Elec. Payment Exch., Inc.*, 2001 WL 1334188, *22-24 (Del. Ch. Oct. 22, 2001). On the issue of causation, the Court of Chancery found that "SIGA's enrichment – *i.e.*, its receipt of free development assistance – directly resulted from PharmAthene's provision of it." (Ex. C, at *28)

To the extent that the Court of Chancery found that this argument applied here with respect to the provision of capital under the Bridge Loan Agreement, finding that agreement provided the "measure of PharmAthene's rights" (Ex. C, at *28) was in error. It is not the repayment of the loan that is at issue here, but rather that PharmAthene provided crucial financial assistance to SIGA when it most needed it. Because SIGA never argued its contract defense theory in the Court of Chancery, PharmAthene did not have an opportunity to explain below (as it has on this appeal (*see* Ph. Br. at 28)) that this contract defense does not apply here at all.

IV. Alternatively PharmAthene Is Entitled To Its Expectation Damages

As the Court of Chancery notes in its opinion, “[t]he ‘standard remedy’ in Delaware, as elsewhere, for breach of contract is based upon the reasonable expectations of the parties *ex ante*.” (Ex. C, at *31)(citing *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001)) Damages “are not ‘speculative’ merely because they are difficult to calculate. Rather than mathematical precision, ‘the law only requires that there be a sufficient evidentiary basis for making a fair and reasonable estimate of damages.’” (Ex. C, at *31)(citations omitted) Furthermore, the Court of Chancery held that damages can be recovered for a “lost business opportunity of...a contract dependent on an uncertain contingency, so long as the value of the ‘lost chance’ is fairly measurable.” (Ex. C, at *32) Also, “while proof of the fact of damages must be certain, proof of the amount can be an estimate, uncertain, or inexact.” *Aligent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *29 n.271 (Del. Ch. Feb. 18, 2010).

Here, it is indisputable that PharmAthene was damaged. SIGA acknowledges (and the Chancery Court found (Ex. C, at *40)) that ST-246 increased in value between January 2006 and November 2006. The Court of Chancery also found that SIGA’s retention of exclusive rights in the patents to ST-246 and related products “are valuable in and of themselves.” (Ex. C, at *38) The only question is the amount of that damage.

First, if the true measure of damages is the parties’ expectations at the time of the breach, *Duncan v. Theratx, supra*, then in this case that is shown by the clear evidence of the parties expectations at that time, most notably by SIGA’s own financial models. SIGA, after going through a detailed analysis, concluded in November 2006 that ST-246 was worth \$3 to \$5 billion. (Ex. C, at *24) Even today, SIGA attempts to defend the \$335 million it demanded in upfront and milestone payments and outsized royalty payments as being reasonable because of ST-246’s increase in value. (SIGA R. Br. at 11)

Dr. Peck testified that as of November 2006 there was an 84% probability that ST-246 would obtain FDA approval and a 95% likelihood of meeting BARDA’s requirements for procurement for the strategic national stockpile¹⁶ and that forecasting the success of a drug was routinely done in the pharmaceutical industry. (B3680, B3682 (Peck)) Dr. Hruby also testified that his predictions (as the person most knowledgeable about the product) regarding ST-246’s likely success in his September 27, 2006 email summarized above (*see supra* at 5) were reasonable expectations. (B3706-07 (Hruby)) *See also* Dr. Rose’s public disclosures about ST-246 (*supra* at 6).

Baliban did not simply use SIGA’s numbers, which support damages well in excess of \$1 billion.¹⁷ Instead, applying Peck’s 84% probability and making his own conservative assumptions (more conservative than SIGA’s),¹⁸ he arrived at a damage figure of \$1,070 million. (B1289; B1291)

¹⁶ Biodefense products, like ST-246, can be procured long before final FDA approval. (B3702 (Rose noting biodefense products can be purchased before new drug application (NDA) filing with the FDA); *see also* B1226-27; B2263)

¹⁷ Baliban determined that under the LATs PharmAthene would receive 69.65% of the earnings of ST-246. (B2537) 69.65% of \$3 billion is \$2,089,500,000.

¹⁸

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Clearly, what troubled the Court of Chancery was Baliban's damage analysis in April 2010 which, **REDACTED** arrived at \$401 million. First, this analysis contained key additional conservative assumptions as compared to his initial analysis, notably that the product would **REDACTED**

REDACTED which accounted for the entire difference in amounts from his initial analysis. Second, the actual legal test for expectancy damages is based on the reasonable expectations of the parties based on what was known at the time of the breach in 2006. Baliban's damages figure of \$1,070 million is a very conservative and well founded basis for awarding PharmAthene its legitimate expectancy damages.¹⁹

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 either 56% or 48% of revenues based on the economic terms of the LATS²⁰ or remand to the Court of Chancery to determine an alternative payment stream consistent with the economic terms of the LATS; or
2. specific performance of 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 plus interest; 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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¹⁹ An ironic alternative measure of damages would be to award PharmAthene the value of SIGA's position under the terms of the LLC minus the upfront and milestone payments PharmAthene would have paid under the LATS.

²⁰ A payment stream of 56% based on what was known in December 2006 or a payment stream of 48% based on what was known in April 2010. (*See supra* at 8)