IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CORRECTED APPELLANT'S OPENING BRIEF

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Table of Contents

EXHIBIT

Table of Authorities

Page(s)

Cases

Other Authorities

Nature of the Proceedings

The Court of Chancery erroneously held that defendant/appellant SIGA Technologies, Inc. breached a duty to negotiate a license in good faith. The Court of Chancery then invented terms for the hypothetical license the parties had never agreed on and imposed an unprecedented remedy that gives to plaintiff/appellee PharmAthene, Inc. a 50% share of the future profits on potentially billions of dollars of sales of a revolutionary smallpox drug, ST-246. The Court of Chancery's judgment lacks factual support, is contrary to established law, and is entirely inequitable.

In two fully integrated contracts, PharmAthene and SIGA agreed to spend 90 days endeavoring to negotiate a license agreement in accordance with a previously negotiated license agreement term sheet (the "LATS") in the event their planned merger failed to close. After the merger terminated due in part to PharmAthene's failure to raise the necessary financing, negotiations ensued. SIGA expended extensive efforts in drafting a comprehensive proposal on terms that accounted for recent developments positively affecting the likely profitability of ST-246, but PharmAthene refused to negotiate further, insisting that the LATS terms were binding. The Court of Chancery rejected this contention and correctly recognized that the LATS itself did not constitute a binding contract to license ST-246. The Court of Chancery further recognized the terms contained therein were neither binding nor intended to be binding.

Nevertheless, the Court of Chancery found that SIGA failed to negotiate in good faith, largely because SIGA's initial proposal included terms that differed substantially from those contained in the non-binding LATS. Relying on this purported breach, and additionally on the equitable theory of promissory estoppel, the Court of Chancery crafted and imposed a remedial order, itself inventing contract terms never agreed to, or even negotiated by the parties. Under this judicially made contract, PharmAthene, whose expenditures in support of the development of ST-246 the Court of Chancery described as "*de minimis*," was made the beneficiary of a highly lucrative arrangement that the parties themselves never contemplated. PharmAthene need not make any financial contribution to bring ST-246 to market, yet is entitled to 50% of the net profit on sales of ST-246 once $40 million of net profits are achieved.

Six opinions and orders of the Court of Chancery are at issue.[1]

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[1] The six opinions and orders described below are filed concurrently as Exhibits A-F respectively.

- On January 16, 2008, the Court of Chancery denied SIGA's motion to dismiss the complaint. *See* Ex. A. In so doing, the Court of Chancery erroneously held that Delaware law should apply, despite the weight of both the parties' conduct and the relevant agreements favoring New York.

- On November 23, 2010, the Court of Chancery denied SIGA's motion for partial summary judgment. *See* Ex. B. The Court of Chancery held that PharmAthene might be able to establish specific performance or expectation damages. The subsequent record utterly fails to support either form of relief, which the Court of Chancery itself ultimately recognized even while imposing analogous relief. Moreover, neither Delaware nor New York permits expectation damages for the only purported wrongdoing, the alleged breach of an agreement to negotiate in good faith.

- The Court of Chancery issued its post-trial opinion on September 22, 2011. *See* Ex. C. The Court of Chancery incorrectly held that SIGA breached the parties' commitment to negotiate in good faith towards a license agreement consistent with the LATS, notwithstanding SIGA's extensive efforts to negotiate an agreement based on what both parties, and the Court of Chancery, recognize were changed economic circumstances. Despite having found that a fully integrated contract covered the subject matter, the Court of Chancery also improperly awarded PharmAthene equitable relief in promissory estoppel. The Court of Chancery then imposed its admittedly unprecedented remedy and improperly awarded PharmAthene one-third of its attorneys' fees based on the erroneous holding that SIGA had acted in egregious bad faith by proposing terms different from those in the non-binding LATS.

- On December 16, 2011, the Court of Chancery denied SIGA's motion for reconsideration as to the extraordinarily excessive relief imposed. *See* Ex. D.

- Finally, the Court of Chancery issued a Letter Opinion and Final Order and Judgment on May 31, 2012 by which it implemented the contract that it earlier erroneously concluded that the parties would have reached. *See* Exs. E & F. The Court of Chancery therein determined what terms should apply with respect to no fewer than 30 discrete points over which the parties disagreed.

As SIGA demonstrates below, the Final Order and Judgment of the Court of Chancery should be reversed in relevant part and judgment entered in SIGA's favor.

Summary of Argument

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

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

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

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

Statement of Facts

We present below the facts necessary to this appeal, as found by the Court of Chancery, except where otherwise noted.

This dispute arises from a failed collaboration effort between New York-based SIGA and Maryland-based PharmAthene in the development and marketing of a revolutionary smallpox drug owned and developed by SIGA intended to prevent and treat infection even after exposure to the virus. In 2005, when the parties first began discussing collaboration, the safety, efficacy, and market potential for this drug were uncertain. Nearly seven years later, the expectation is that the drug may generate sales in the billions of dollars.

SIGA Acquires ST-246 and Begins Talks with PharmAthene

ST-246 is an orally available small-molecule drug intended for the prevention and treatment of pathogenic orthopoxvirus diseases, including smallpox. Ex. C, at *2. SIGA acquired the technology for ST-246 from another company called ViroPharma, Inc., at a time when its viability and potential were unknown. *Id*. Although SIGA was hopeful that ST-246 would eventually be profitable, there was a strong likelihood that, like many other drugs in development, it would turn out to be worthless. After acquiring ST-246, SIGA invested approximately $500,000 in its development, but eventually concluded that it would require an additional $16 million to bring the drug to market.

SIGA began discussions with PharmAthene regarding a possible collaboration. *Id*. at *3. The parties' initial discussions focused on a license. In January 2006, the parties conducted negotiations in New York for a non-binding license agreement term sheet (the "LATS"). *Id*. at *5; A1. The LATS contemplated a partnership pursuant to which SIGA would grant a license for ST-246 – many essential terms of which were undefined and left to future negotiation between the parties – in exchange for which PharmAthene would fund research relating to ST-246 based on a defined research and development budget, and pay an upfront license fee of $6 million, including $2 million upfront, $2.5 million to be paid 12 months after execution of a license agreement if certain events occurred, and $1.5 million after SIGA obtained financing in excess of $15 million. A2. The LATS also provided for milestone payments totaling $10 million, for annual royalty payments to SIGA of between 8% and 12% of yearly net sales, and for payments to SIGA of 50% of any amounts by which net margin exceeds 20% on sales to the U.S. government. Ex. C, at *5; A3.

Importantly, the LATS stated on its face that it was "Non-Binding." A1. PharmAthene acknowledged that these words were used to connote that the terms of the LATS were "open for negotiation." A806 (Richman).[2] The Court of Chancery correctly found that the LATS was non-binding because the parties did not intend it to be binding and it lacked essential terms. Ex. C, at *15-16, *17-18.

PharmAthene Shifts the Parties' Discussions from a License Agreement to a Merger Agreement and Bridge Loan Agreement

While the terms of the LATS were still unresolved and being negotiated, PharmAthene decided that it would rather pursue a merger agreement with SIGA. The parties negotiated a non-binding Merger Agreement Term Sheet, which provided that a definitive merger agreement would require the parties to negotiate a license for ST-246 for an exclusive period of 90 days in the event the definitive merger agreement was terminated. A7.

The parties proceeded to negotiate a Bridge Loan Agreement and a Merger Agreement; they met in the New York offices of SIGA's largest stockholder to do so. Ex. C, at *6. First, on March 20, 2006, the parties entered into the Bridge Loan Agreement to provide short-term financing to SIGA. Under its terms, PharmAthene would loan SIGA $3 million for "(i) expenses directly related to the development of [ST-246], (ii) expenses relating to the Merger, and (iii) corporate overhead." A56 ("Bridge Loan Agreement") § 2.6. The Bridge Loan Agreement requires the parties, in the event a merger is not consummated, to "nego-

[2] For the Court's convenience, we identify the following trial witnesses whose testimony is cited in this brief: Eric Richman, the current President and CEO of PharmAthene, and the Vice President of Business Development and Strategic Planning during 2005-2006 (A803); Dennis Hruby, the Chief Scientific Officer at SIGA (A784); David Wright, the President and CEO of PharmAthene until April 2010 (A828); Valerie Riddle, Vice President and Medical Director at PharmAthene in 2005-2006 (A813); Wayne Morges, Senior Vice President of Regulatory Affairs and Quality at PharmAthene (A796); James Grayer, an attorney at Kramer Levin, counsel for SIGA (A782); Donald Drapkin, Vice Chairman at MacAndrews & Forbes (SIGA's largest stockholder) during the relevant period (A762); Steven Fasman, Senior Vice President Law at MacAndrews (A765); Keith Ugone, SIGA's damages expert (A825); and Thomas Konatich, SIGA's Chief Financial Officer and then-acting CEO in 2005-2006 (A793). Citations to trial testimony identify the witness in parentheses following the citation to the appendix.

tiate in good faith with the intention of executing a definitive license agreement in accordance with the terms set forth in the [LATS]." A47 § 2.3(a).

At trial, PharmAthene contended that it provided the Bridge Loan in reliance on an alleged agreement that PharmAthene would have a continuing relationship with respect to ST-246. Ex. C, at *7. In fact, however, the Bridge Loan Agreement was a fully integrated and standalone document, and it specifically contemplated that the parties could ultimately fail to reach an agreement with respect to their collaboration. A47 §§ 1.1, 7.9; A807 (Richman). For example, the Bridge Loan Agreement provided a maturity date of two years from the date of the loan if no merger or execution of a definitive license agreement occurred (A47 § 1.1), and it was secured by the entirety of SIGA's assets (A47 § 2.3(e)). The Bridge Loan Agreement also included an integration clause, which provided that it, together with its supporting notes and security documents, "represent the agreement of the Issuer [SIGA] and Holder [PharmAthene] with respect to the subject matter hereof." A47 § 7.9. The obligation to negotiate exclusively was limited to 90 days. A47 § 2.3(a). Nowhere in the Bridge Loan Agreement is there any language that could be interpreted to require the parties to enter into a license agreement should such negotiations fail. The Bridge Loan Agreement designated New York law as the governing law for it and the related purchase documents. A47 § 7.11.

Second, the parties entered into the Merger Agreement on June 8, 2006. A119 ("Merger Agreement"). The Merger Agreement had a drop-dead date of September 30, 2006, which meant that if the parties failed to close the merger before that date, the party not responsible for the failure to close could terminate the Merger Agreement. A119 § 12.1(a)(v). In the event of termination, the Merger Agreement, like the Bridge Loan Agreement, provided that the parties would "negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the [LATS]." A119 § 12.3. As in the Bridge Loan Agreement, the obligation to negotiate exclusively was limited to 90 days. A119 § 12.3. Thus, like the Bridge Loan Agreement, the Merger Agreement specifically contemplated that the parties might fail to reach any final accord at all. The Merger Agreement designated Delaware law. A119 § 13.5.

With Minimal PharmAthene Help,
ST-246 Achieves Significant Milestones

In the summer of 2006, after the Bridge Loan and Merger Agreements were signed, ST-246 achieved several significant mile-

stones. A clinical trial organization agreed to perform the first human test of ST-246, the results of which indicated that ST-246 was safe and well-tolerated by the human volunteers at all tested orally administered doses. A687; A760. SIGA also received funding from the National Institutes of Health ("NIH") to develop ST-246. Most importantly, ST-246 was shown to provide 100% protection against smallpox in a primate trial, which was an enormously positive result concerning the drug's potential efficacy. Ex. C, at *8-9; A603. These developments – each of which could have turned out otherwise – meaningfully enhanced the potential value of ST-246.

Meanwhile, PharmAthene provided minimal assistance to SIGA. A829 (Wright); A802-04 (Richman); A798-800 (Morges); A593; A671; A814-15, A815, A816-17, A823-24 (Riddle, testifying that PharmAthene was limited in its ability to participate in any aspect of regulatory approval but quality management); A785, A786, A787, A790-91, A792 (Hruby). Although PharmAthene now claims that its assistance was critical to ST-246's development, in fact its assistance was largely unsolicited and of limited or no help to SIGA. A819-22 (Riddle, testifying that SIGA had achieved NIH approvals without PharmAthene's help, that PharmAthene had provided SIGA an old Power Point presentation for SIGA to use in its pitch to the NIH concerning quality control and quality assurance issues, that PharmAthene did not present at the NIH reverse site regulatory visit, and that PharmAthene was excluded from the private afternoon session); A673. Consistent with SIGA's uncontested expert's report, the Court of Chancery found that PharmAthene expended only "a few hundred thousand dollars" in performing these services.[3] Ex. C, at *35.

PharmAthene Is Unable to Complete the Merger

At the same time that ST-246 was passing its milestones, PharmAthene attempted but failed to secure an additional $25 million in private equity funds necessary for PharmAthene to complete the merger. A808 (Richman). By September 30, the Merger Agreement's drop-dead date, PharmAthene had still not succeeded in raising the necessary funding, and had encountered "significant[]" delays in preparing SEC-compliant audited financials, which were required of PharmAthene for the merger to close. A808 (Richman); A783 (Grayer). PharmAthene requested an

[3] SIGA presented uncontroverted evidence at trial that PharmAthene incurred out-of-pocket expenses relating to ST-246 between January 26, 2006 and December 20, 2009 of approximately $205,000. A827 (Ugone); A590.

extension of the Merger Agreement in order to remedy its failures. A808 (Richman). SIGA's board of directors, however, concluded that the board's fiduciary obligations to SIGA and its stockholders precluded the board from granting the extension, and it therefore declined to do so. A763-64 (Drapkin). PharmAthene conceded, as the Merger Agreement required it to do, that SIGA had the right to so decline. A808 (Richman). SIGA notified PharmAthene that it was terminating the Merger Agreement pursuant to Section 12.1(a). A283. Subsequently, on October 23, SIGA repaid the entire $3 million due on the Bridge Loan Agreement with interest. A759.

PharmAthene Refuses to Negotiate

After the Merger Agreement was terminated, the parties began negotiations toward a definitive license agreement. For its part, PharmAthene sent SIGA a six-page proposed license agreement that was little more than the LATS, with the addition of signature blocks. A284; *compare* A1; A767-68 (Fasman). In response to PharmAthene's incomplete effort and in light of the fact that the LATS had contemplated a partnership, SIGA proposed that the parties discuss a more comprehensive agreement, and that their collaboration now proceed in the form of the partnership to which the LATS referred. A675; A760-770 (Fasman). PharmAthene agreed that it would be willing to consider a different deal structure and profit split, and acknowledged that the changed circumstances in the eight months since the LATS had been drafted might merit changes to the economic terms originally discussed. A403; A601; A772 (Fasman); A809-10 (Richman); A794 (Konatich); Ex. C, at *10, *20, *38 ("Olstein [outside counsel to PharmAthene] responded that . . . PharmAthene would consider economic terms somewhat different than those included in the LATS").

PharmAthene asked that SIGA draft a full LLC Agreement rather than a term sheet reflecting SIGA's initial proposal. A401; A772 (Fasman). Expending tremendous time, effort, and cost, SIGA and its outside counsel drafted a detailed 102-page LLC Agreement. A291 (the "Draft LLC Agreement"). The Draft LLC Agreement took into account the recent increase in market value of ST-246 and the promising trial results obtained in the interim by SIGA without any significant help from PharmAthene. Thus, its draft proposed an increase in upfront payments owed by PharmAthene to SIGA from $6 million to $100 million, an increase in royalty percentages owed to SIGA, and retention by SIGA of 50% of any remaining profit. Ex. C, at *10; A343, 351-52. SIGA intended the Draft LLC Agreement to be a starting point for negotiating an agreement, and expected that PharmAthene would respond to it as such.

A773, A776, A777 (Fasman).

As PharmAthene requested, SIGA submitted the Draft LLC Agreement to PharmAthene on November 21, 2006. A291. Despite having previously insisted that SIGA draft a full-fledged agreement (A772 (Fasman)), PharmAthene blind-sided SIGA by taking the position that it considered the terms in the LATS to be fixed – and binding – contrary to the prior negotiations (A779 (Fasman); A794 (Konatich); A601). PharmAthene then maintained that it would diverge from the LATS only on the issue of profit-sharing, and only on the condition that SIGA consent to a final agreement that was otherwise the same as the LATS. A779 (Fasman). Subsequently, PharmAthene confirmed that it would not agree to any change in the upfront and milestone payments provided for in the LATS. A601.

PharmAthene took those positions despite the fact that the parties had not completed their negotiation and the obvious fact that the LATS lacked significant material terms, such as: "defined funding obligations, details as to the structure, composition and dispute resolution procedures for the joint research and development committee, or any other committees necessary for the development and commercialization of ST-246; delineation of the patent prosecution and infringement responsibilities of the parties; minimum sales or diligence obligations; and, if a partnership was contemplated, provisions detailing the structure of such an arrangement." Ex. C, at *17. SIGA reiterated that it wished to continue negotiations of a definitive agreement on terms "that are fair, reasonable and commercially sensible," without preconditions. A401; A405. But PharmAthene – rather than engaging in negotiations, providing comments on the Draft LLC Agreement or even simply making a counter-proposal – instead filed suit against SIGA before the 90-day exclusivity period had expired. A780 (Fasman); A812 (Richman, acknowledging that PharmAthene could have sought to negotiate the various aspects of the proposal to which it objected but did not do so). Thus, PharmAthene took the position – which even the Court of Chancery rejected – that the LATS was binding, and terminated the negotiations.

The Court of Chancery Litigation

In its initial complaint filed on December 20, 2006, PharmAthene alleged that SIGA had breached its obligation to negotiate in good faith in accordance with the terms set forth in the LATS and had accordingly failed to execute a license agreement with respect to ST-246. PharmAthene requested that the Court of Chancery order SIGA to enter into a license agreement, and sought damages for SIGA's purported contractual breaches and for promissory estoppel and unjust enrichment

based on the assistance that PharmAthene had allegedly provided to SIGA during the pendency of the proposed merger.

SIGA moved to dismiss the complaint on January 9, 2007. On January 16, 2008, the Court of Chancery denied SIGA's motion to dismiss. According to the Court of Chancery, PharmAthene could conceivably show that the parties had intended the LATS to be binding, that the LATS contained all material and essential terms, and that PharmAthene was entitled to the relief it sought. The Court of Chancery further ruled, incorrectly, that Delaware law applies to the parties' dispute, because the Merger Agreement – which the parties had terminated – designated Delaware law, because the Merger Agreement was the last-in-time of the agreements between the parties, and because, in the Court of Chancery's erroneous view, the scope of the Merger Agreement was broader than that of the Bridge Loan Agreement, which designated New York law.

After extensive discovery, PharmAthene filed an amended complaint on May 5, 2009. PharmAthene's amended complaint added no new facts, claims, or requests for relief. Instead, it added only the theory that any allegedly unreasonable deviation from the LATS constituted a breach of the good faith duty.

On March 19, 2010, SIGA moved for partial summary judgment declaring that (i) because the LATS did not include all of the essential terms of a license agreement and was therefore not binding, PharmAthene was not entitled to an award of specific performance, and (ii) an award of expectation damages would in any event be speculative. The Court of Chancery denied SIGA's motion for partial summary judgment on November 23, 2010. The Court of Chancery held that there was an issue of fact as to whether the LATS was a binding contract, and that, although unlikely, PharmAthene could conceivably show entitlement to expectation damages under an ordinary breach of contract theory. In its ruling, the Court of Chancery correctly held that PharmAthene was not entitled to any form of patent damages, including a "reasonable royalty," as such damages are available only in actions for patent infringement, and this case was not such an action.

The Court of Chancery held an eleven-day trial between January 3 and 21, 2011, during which PharmAthene put forth at least eight alternative damages models varying from $402 million to $1.017 billion in expectation damages. A1044. In its post-trial opinion issued on September 22, 2011, the Court of Chancery correctly held that the LATS, and the terms therein, are not binding, either standing alone or as attached to the Bridge Loan Agreement or the Merger Agreement. Specifically, the Court of Chancery held that the LATS is not binding because:

(1) it lacked essential terms; and (2) the parties did not intend it to be binding. The Court of Chancery also held that the parties did not intend "to require that any later formal agreement include exactly the same terms as the LATS." Ex. C, at *14-18. The Court of Chancery found that the parties are not bound by the LATS's provisions that SIGA grant PharmAthene a license to ST-246, that PharmAthene is not required to pay an upfront license fee, and that the parties are not bound by the royalties schedule laid out in the LATS. The Court of Chancery additionally held that PharmAthene is not entitled to specific performance of the obligation to negotiate in good faith, and correctly rejected all of PharmAthene's proof of expectation damages as speculative. *Id.* at *35-37. The Court of Chancery also rejected the unjust enrichment claim because PharmAthene did not put on evidence of the value of the services it rendered. *See id*. at *28-29.

The Court of Chancery, however, incorrectly concluded that SIGA breached its obligation to negotiate in good faith with the intention of executing a definitive license agreement under § 2.3 of the Bridge Loan Agreement and under § 12.3 of the Merger Agreement. This conclusion is erroneous as a procedural matter because PharmAthene waived it by failing to make this argument in its opening post-trial brief. It is erroneous as a substantive matter because SIGA made every effort to negotiate with PharmAthene in good faith, and because it cannot be the case that merely proposing terms that differ from a non-binding preliminary agreement to agree constitutes bad faith. Having already found breach of contract, the Court of Chancery further held, contrary to law, that PharmAthene was additionally entitled to relief on the quasi-contractual basis of promissory estoppel.

The Court of Chancery then awarded a massive remedy it styled a "constructive trust" or an "equitable payment stream" in an attempt to side-step the problem that expectation damages were too speculative.[4] The Court of Chancery, without imposing any obligations on PharmAthene to make any upfront payment or contribute in any way to the development, marketing, or commercialization of ST-246, granted PharmAthene a royalty-like "equitable payment stream" equal to half of all profits on the sale of ST-246 in excess of $40 million for ten years. The

[4] The equitable payment stream awarded is also similar to a patent measure of damages, which the Court of Chancery had earlier rejected in its summary judgment opinion because such damages are available only as a remedy for patent infringement. Ex. B, at *13. The Court of Chancery's award of what are effectively patent damages here is likewise an attempt to side-step the requirements for such relief.

Court of Chancery itself recognized that this form of relief is unprecedented, *see* Ex. C, at *33, *38-9 ("Admittedly, there is little precedent to aid this Court in fashioning an appropriate remedy . . . ," "[s]uch a remedy would operate somewhat similarly to an award of a constructive trust or of an equitable lien . . ."), and that it departs from anything the parties had discussed. *See* Ex. E, at *3, *4.

In awarding this relief, the Court of Chancery effectively created a contract where there had been no meeting of the minds. The Court of Chancery speculated that, had the parties engaged in good faith negotiations, they would have agreed to an increase in upfront and milestone payments to $40 million, and to a 50-50 profit split – without regard to any of the other myriad terms necessary to the formation of a binding contract. Even assuming PharmAthene is entitled to a remedy, and it is not, the relief ordered is dangerously speculative and a vast overreach of the Court of Chancery's equitable powers when a remedy at law was available.

The relief is also unsupported by the record evidence. For instance, there are contemporaneous communications from PharmAthene that it would not consider the 50-50 profit split (A403), and would not agree to any increase in the upfront or milestone payments (A601). Nor was there any evidence that PharmAthene even had the ability to raise $40 million in upfront and milestone payments; indeed, the Merger Agreement had not closed in part because of PharmAthene's failure to raise only $25 million a little more than two months previously. Had SIGA proposed to PharmAthene precisely the terms that the Court of Chancery found PharmAthene would have accepted, the evidence plainly indicates that PharmAthene would have walked away, given its late-in-the-day insistence on the terms of the LATS and the more than 30 disputes over terms that occurred while briefing the form of final order.[5]

Finally, the Court of Chancery also erroneously awarded PharmAthene one-third of its reasonable attorneys' fees, expenses, and expert witness costs, based both on a fee-shifting provision in the Bridge Loan Agreement and the erroneous conclusion that SIGA acted in bad faith.

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[5] Nor is there evidence that SIGA, acting in good faith, would have accepted these terms. At most, the record indicates that SIGA floated the idea of an upfront payment from PharmAthene in the range of $40-45 million, which says nothing of milestone or other payments that SIGA might require from PharmAthene (A771 (Fasman), A679), and there was no evidence whatsoever that SIGA would agree to a 50-50 profit split with such an upfront payment.

On December 16, 2011, the Court of Chancery denied SIGA's motion for reconsideration as to the relief imposed. Subsequently, the parties proceeded for months to dispute the form of final order implementing the remedy the Court of Chancery had awarded in its post-trial opinion. Because the hypothetical agreement on which the Court of Chancery based its remedy failed to address, among other things, how to calculate "net profits," which in turn required resolution of many essential terms necessary to craft an implementing order, and because the parties had never reached an agreement on those terms, the Court of Chancery asked the parties to agree, if possible, on the necessary language. The parties were unable to agree on the form of final order, and, as the Court of Chancery noted, disagreed on "no less than thirty discrete points." Ex. E, at *1. Between December 2011 and the end of February 2012, the parties submitted competing draft final orders, as well as briefing and letters in support of their respective drafts. The Court of Chancery issued a Letter Opinion and Final Order and Judgment on May 31, 2012, in which it determined as to each point how it believed the parties should have agreed.

As we demonstrate below, the Court of Chancery erred in holding: (1) that SIGA failed to negotiate in good faith; (2) that PharmAthene is entitled to relief under the doctrine of promissory estoppel; (3) that PharmAthene was entitled to unprecedented and excessive relief that provides a windfall to PharmAthene without its having contributed, or being required to contribute, to the success of ST-246; and (4) in awarding PharmAthene attorneys' fees, expenses, and expert witness costs.

Argument

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

A. Question Presented: Did the Court of Chancery err in holding that SIGA breached an obligation under the Bridge Loan and Merger Agreements to negotiate in good faith? This issue was preserved for appeal. (*See* A1112-1116; A1133 n.1.)

B. Standard of Review: Determinations of fact are reviewed for abuse of discretion. *Reserves Dev. LLC* v. *Crystal Props, LLC*, 986 A.2d 362, 367 (Del. 2009). Legal conclusions are reviewed *de novo*. *Id.*; *Bank of N.Y. Mellon Trust Co., N.A.* v. *Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011). The Court of Chancery's findings of fact are largely undisputed for the purposes of this appeal. The conclusion that SIGA's conduct amounted to a breach of its duty to negotiate in good faith is wrong as a matter of law. The standard of review is thus *de novo*.

C. Merits: The Court of Chancery erroneously held that SIGA breached its obligations to "negotiate in good faith with the intention of executing a definitive license agreement in accordance with the terms set forth in the [LATS]" under § 2.3 of the Bridge Loan Agreement and § 12.3 of the Merger Agreement. Ex. C, at *19, *22. The Court of Chancery based this conclusion solely on the grounds that the terms SIGA initially proposed in the fall of 2006 in connection with negotiating a license agreement differed substantially from those set forth in the non-binding LATS. *Id*. at *22. In doing so, the Court of Chancery disregarded the undisputed fact that, even as PharmAthene acknowledged, the economic circumstances surrounding ST-246 had materially changed in between the time of the LATS and the failed negotiation at issue. It is also true that no record evidence suggests that SIGA ever insisted on particular terms or indicated that it was inflexible, that there was any trick or artifice in the negotiations, and that SIGA did anything other than honor its obligation to negotiate exclusively with PharmAthene. *See* Ex. C, at *21-22.

The Court of Chancery's ruling is erroneous for several reasons. First, as a procedural matter, PharmAthene waived its argument that SIGA breached an obligation to negotiate in good faith by failing to raise it in its post-trial opening brief. *Emerald Partners* v. *Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) (upholding the court's refusal to "consider [a] contention because it had never been advanced in any brief"), *aff'd*, 840 A.2d 641 (Del. 2003); *Williams* v. *White Oak Builders, Inc.*, 2006 WL 1668348, at *6 n.95 (Del. Ch. June 6, 2006) (plaintiff

"waived any claim for negligent misrepresentation . . . by not addressing it in her opening post-trial brief"), *aff'd*, 913 A.2d 571 (Del. 2006). As the Court of Chancery noted, PharmAthene "briefed its arguments as if the failure to implement the LATS itself, rather than the failure to negotiate in good faith, were the relevant wrong." Ex. C, at *30 n.169. Because PharmAthene addressed this argument only in its reply, it was not properly considered by the Court of Chancery.[6]

Second, the Court of Chancery's ruling is erroneous on the merits because it cannot be squared with the Court of Chancery's own conclusion that the LATS was not binding, even as incorporated into the Bridge Loan and Merger Agreements. *Id*. at *14-15 ("PharmAthene either has conceded that the LATS standing alone is nonbinding or has failed to prove by even a preponderance of the evidence that when the parties negotiated the LATS in January 2006 they intended it to constitute a binding license agreement."); *id*. at *14 ("as of [January 26, 2006, the date of the last iteration of the LATS], the parties did not intend the LATS to be binding."); *id*. at *16 (the parties "did not intend the LATS as attached to these agreements . . . to require that any later formal agreement include exactly the same terms as the LATS."); *id*. at *18 ("[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.").

Where parties do not intend a preliminary agreement as to final contract terms to be binding, revisiting such negotiations cannot be a breach. *See Int'l Equity Capital Growth Fund, L.P.* v. *Clegg*, 1997 WL 208955, at *9 (Del. Ch. Apr. 22, 1997) (finding agreement as to price was not binding because other material terms remained outstanding and "the law of contracts has long reflected the interdependent nature of the specific terms of a contract under negotiation"); *Phx. Mut. Life Ins. Co.* v. *Shady Grove Plaza Ltd. P'ship*, 734 F. Supp. 1181, 1186-89 (D. Md. 1990). *VS&A Communications Partners, L.P.* v. *Palmer Broad. Ltd.*, 1992 WL 339377 (Del. Ch. Nov. 16, 1992), is instructive.[7] In that case,

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[6] The Court of Chancery incorrectly found that PharmAthene had raised this argument in its opening brief, citing a footnote in PharmAthene's brief. *See* Ex. C, at *19 n.116. But that footnote instead argued that the LATS was made binding by the Bridge Loan Agreement and the Merger Agreement. A1025 n.47.

[7] While New York law applies to this action, (*see*, *infra*, pp. 20-22) it does not require a different result on this issue than Delaware law. It is similarly plain under New York law that a party does not breach its obligation to negotiate in good faith by taking a position that differs from a

the Court of Chancery explained:

> What is critical . . . is not whether the parties had in fact reached agreement on all material terms of a sale or not. What is critical is whether the parties reached an agreement to be bound with respect to those material terms . . . [While defendant] continue[d] to have obligations to [plaintiff] – not to negotiate with others, etc. – it had . . . no legal duty to commit itself legally to terms it had earlier negotiated (*e.g.*, price) but had expressly not bound itself to legally. . . . Markets change. Negotiating a complex transaction is always subject to the risk that a material change in a relevant market will suddenly make a proposed deal uneconomic from one side of the transaction or the other. That risk inevitably exists until a party is legally bound.

VS&A Commc'ns, 1992 WL 339377, at *10, *17.

Even taking into account the parties' agreement to negotiate "in accordance with the terms" set forth in the LATS, given the Court of Chancery's holding that neither the LATS nor the terms therein were binding (Ex. C, at *16), it cannot be that the "good faith" obligation required that "any future license would contain terms substantially similar to the LATS," as the Court of Chancery also concluded. Ex. C, at *22. The economic conditions surrounding ST-246 had changed dramatically from those when the non-binding LATS was drafted. As explained above, by November 2006 ST-246 had achieved promising results in human and primate trials, significantly increasing the likely value of ST-246, and SIGA had received funding to develop the drug. It would be a "radical interpretation" of the non-binding LATS and a deviation from well-settled law to hold that SIGA was limited in the negotiations from revisiting the terms in the LATS. *See VS&A Commc'ns*, 1992 WL 339377, at *9 (would be "radical interpretation" of preliminary, non-binding agreement to find that terms therein were binding).

Third, the Court of Chancery expressly found that, in light of the changed circumstances, PharmAthene would have accepted terms different from those contained in the LATS. Specifically, the Court of Chancery found that PharmAthene offered to split 50-50 the profits from ST-246 (as opposed to paying SIGA a royalty of 8-12% on net sales, as provided for in the LATS), and that PharmAthene would have agreed to an increase in the upfront and milestone payments from $16 million, in the

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preliminary term sheet. *See, e.g.*, *Bernstein* v. *Felske*, 143 A.D.2d 863, 865 (N.Y. App. Div. 1988).

LATS, to $40 million. Ex. C, at *38 n.228. SIGA does not agree with that determination. But by concluding that the resulting contract, had the parties negotiated in good faith, "would have resulted in terms no less favorable to PharmAthene than the 50/50 profit split it already had mentioned and an increase in the upfront and milestone payments," the Court of Chancery implicitly recognized that SIGA had the right to negotiate for – and insist on – terms materially different from the LATS and reflective of the changed outlook for ST-246. *Id.* at *16, *38.

Indeed, if SIGA's opening proposal differed significantly from the terms in the LATS, so, too, did the contract that the Court of Chancery crafted for the parties. The "agreement" embodied in the Court of Chancery's relief greatly increased (from $16 million to $40 million) the upfront and milestone payments from PharmAthene to SIGA, made those "payments" notional by never requiring PharmAthene to actually pay anything, and completely changed the royalty payment scheme into a 50-50 profit sharing. *Id*. at *38. The Court of Chancery acknowledged that it arrived at those terms based on the "roughly threefold" increase in ST-246's market potential. *Id*. at *40. Given the Court of Chancery's holdings that SIGA could propose different terms, it is erroneous to conclude that SIGA breached the contract merely by proposing terms that varied materially from the LATS – particularly where they were part of a first proposal, where SIGA was fully prepared to negotiate all of the terms, and where the other side refused to do so in the erroneous belief that the LATS was binding.

Moreover, as a policy matter, the Court of Chancery's remedy injects ambiguity into what should be a simple matter of contract interpretation. According to the Court of Chancery, even though the parties were not bound by the terms of the LATS (*id*. at *16), SIGA's room for negotiating a final agreement was nonetheless restricted to an indeterminate extent because it was constrained to negotiate terms "substantially similar to the LATS." *Id*. at *22. Under this reasoning, SIGA apparently risked breaching its obligation to negotiate in good faith if it proposed terms that differed to some unspecifiable extent from what was set forth in the LATS. Such a result is dangerous, contrary to Delaware's interest in permitting the businesses incorporated here to contract freely, and not supported by precedent. *See*, *e.g.*, *VS&A Commc'ns*, 1992 WL 339377, at *9 (obligation to negotiate in good faith encompassed only obligation to negotiate exclusively for the specified time frame); *id*. at *10 (party had no "legal duty" to commit itself to terms earlier negotiated but that it had expressly not bound itself to). Nor should it be the case that where, as here, a court dislikes one party's initial negotiating posture, that party can be forced to relinquish half of its profits, receiving nothing in return.

II. Promissory Estoppel Provides No Basis for Relief

A. Question Presented: Did the Court of Chancery err in holding that PharmAthene was entitled to relief on the equitable grounds of promissory estoppel, where the parties' relationship was governed by a series of fully executed contracts? This issue was preserved for appeal. (*See* A867-70; A904-906; A956-958; A1117-1118; A1133 n.1.)

B. Standard of Review: The facts relevant to promissory estoppel are uncontested on appeal. The Court of Chancery misapplied settled principles of Delaware law, which this Court reviews *de novo*. *Olson* v. *Halvorsen*, 986 A.2d 1150, 1159 (Del. 2009).

C. Merits: Promissory estoppel does not apply because the parties' relationship is governed by two valid, enforceable, integrated contracts – the Bridge Loan Agreement and the Merger Agreement – and SIGA's promise to negotiate in good faith was incorporated into both of those contracts. A47; A119.

Where a promise is the subject of a contract, promissory estoppel simply does not apply. *Genencor Int'l, Inc.* v. *Novo Nordisk A/S*, 766 A.2d 8, 12 (Del. 2000) ("promissory estoppel analysis is not applicable to cases in which the alleged promise is supported by consideration"). Moreover, promissory estoppel is inapplicable where, as here, a contract contains an enforceable integration clause that precludes oral modifications. *Cent. Mortg. Co.* v. *Morgan Stanley Mortg. Capital Holdings LLC*, 2010 WL 3258620, at *13 (Del. Ch. Aug. 19, 2010) (refusing to apply promissory estoppel because the parties' "[a]greement contained an enforceable integration clause that precluded oral modifications to the contract."), *rev'd on other grounds*, 27 A.3d 531 (Del. 2011); *Grunstein* v. *Silva*, 2009 WL 4698541, at *8 (Del. Ch. Dec. 8, 2009) (same).[8]

Here, the Court of Chancery held that both the Bridge Loan Agreement and the Merger Agreement between PharmAthene and SIGA "constitute valid contracts." Ex. C, at *34. And both the Bridge Loan Agreement and the Merger Agreement contain valid integration clauses. A47 § 7.9; A119 § 13.2. Promissory estoppel is thus simply unavailable.

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[8] New York law also holds that promissory estoppel is not available where the alleged promise is the subject of a valid contract between the parties, *see Clark-Fitzpatrick, Inc.* v. *Long Island R.R. Co.*, 516 N.E.2d 190, 193 (N.Y. 1987), so there is no need here to examine choice of law. Choice of law is addressed *infra* pp. 20-22.

Promissory estoppel cannot be used to supply additional terms to an otherwise valid, fully enforceable and integrated agreement. *Genencor Int'l*, 766 A.2d at 12. The Court of Chancery especially cannot use promissory estoppel to read into the Bridge Loan Agreement and Merger Agreement additional terms that otherwise contradict or undermine those agreements and the bargains struck by the parties. *Olson* v. *Halvorsen*, 2009 WL 1317148, at *12 (Del. Ch. May 13, 2009) (promissory estoppel is unavailable when a claim is "based on promises that contradict the terms of a valid, enforceable contract") (quoting *Weiss* v. *Nw. Broad., Inc.*, 140 F. Supp. 2d 336, 345 (D. Del. 2001)), *aff'd*, 986 A.2d 1150 (Del. 2009); *see Blaustein* v. *Lord Baltimore Capital Corp*., 2012 WL 2126111, at *4 (Del. Ch. May 31, 2012) (same); *Eisenmann Corp.* v. *Gen. Motors Corp.*, 2000 WL 140781, at *16 (Del. Super. Jan. 28, 2000) ("Where parties have an enforceable contract and merely dispute its terms, scope, or effect, one party cannot recover for promissory estoppel.").

The Court of Chancery held that SIGA agreed "to afford [PharmAthene] a good faith opportunity to obtain control of ST-246," but read into that agreement an entirely different, supplemental, promise that those good faith negotiations would be successful. Ex. C, at *27. Even PharmAthene understood that the parties might not reach any agreement on a definitive license. Both parties expressly contemplated that possibility and drafted the repayment provisions of the Bridge Loan Agreement precisely to address what would happen if neither a merger nor a license were to come to fruition. A47 § 1.1; A831 (Wright). It was thus error for the Court of Chancery to invoke promissory estoppel in transforming the LATS, whose terms neither party intended to be binding and which lacked essential terms, into a commitment to enter into a contract. Ex. C, at *27.

III. The Relief Ordered by the Court of Chancery is Impermissible as a Matter of Law and in Any Event Is Inequitable.

A. Question Presented: Did the Court of Chancery exceed its authority by awarding a so-called equitable payment stream/constructive trust, a remedy wholly unavailable under New York law and inappropriate under Delaware law? This issue was preserved for appeal. (*See* A1130-32; A1132-39.)

B. Standard of Review: Under Delaware law, a trial court's decision on choice of law is subject to *de novo* review. *J.S. Alberici Constr. Co., Inc.* v. *Mid-W. Conveyor Co., Inc.*, 750 A.2d 518, 520 (Del. 2000) (citing *Colonial Educ. Assoc.* v. *Bd. of Educ.*, 685 A.2d 361, 363-64 (Del. 1996)). *De novo* review is further appropriate because the Court of Chancery's choice of law ruling was made on SIGA's motion to dismiss. *See Sagarra Inversiones, S.L.* v. *Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1078 (Del. 2011). "Whether or not an equitable remedy exists or is applied using the correct standards is an issue of law and reviewed *de novo*. Determinations of fact and application of those facts to the correct legal standards, however, are reviewed for an abuse of discretion." *Lingo* v. *Lingo*, 3 A.3d 241, 243-44 (Del. 2010) (quoting *Schock* v. *Nash*, 732 A.2d 217, 232 (Del. 1999)).

C. Merits: For breach of a duty to negotiate in good faith, New York law applies and limits relief to reliance damages. *Goodstein Constr. Corp.* v. *City of N.Y.*, 604 N.E.2d 1356, 1359-61 (N.Y. 1992). But the Court of Chancery ignored New York law, and took it upon itself to determine what the parties would have agreed to had they conducted further negotiations and had those further negotiations been successful. Both the Bridge Loan and Merger Agreements "recognize that the parties might never enter into a license agreement" at all. Ex. C, at *16. The Court of Chancery's remedy ignores this fact. Neither PharmAthene nor SIGA presented any evidence in support of the notion that it was more likely than not that the parties would have reached an agreement, or on the likely terms of any such agreement.

The Court of Chancery nevertheless found in its post-trial opinion that, had negotiations continued, the parties would have reached a final contract providing for a $40 million upfront payment from PharmAthene and a 50-50 profit-sharing arrangement. The Court of Chancery accordingly imposed a so-called "equitable payment stream or constructive trust" on those terms as a remedy, while leaving the parties to try to negotiate, and ultimately imposing significant remaining details, including the definition of the term "net profits," which in turn raised a host of other issues. *Id*. at *42. Neither New York nor Delaware law permits

such a remedy.

1. New York Law Applies and Limits Recovery to Reliance Damages

The Court of Chancery wrongly held in its denial of SIGA's motion to dismiss that Delaware law applies to PharmAthene's claims. The Court of Chancery was incorrect in ruling that under § 187 of the Restatement (Second) of Conflict of Laws, which governs remedies awarded in contract, Delaware law applies.

Consistent with § 187, when two contracts are alleged to have been breached and each contract has a governing law provision designating a different state's law, the Court must determine which contract takes precedence. Here, that is clearly the Bridge Loan Agreement. First, the choice of law clause in the Bridge Loan Agreement is broader than that in the Merger Agreement because it provides that New York law applies to other agreements between the parties in addition to the Bridge Loan Agreement itself. The obligation to negotiate in good faith first appears in the Bridge Loan Agreement, and the Bridge Loan Agreement states that "[t]his Agreement and the purchase documents and the rights and obligations of the parties under this agreement and the purchase documents shall be governed by, and construed and interpreted in accordance with, the laws of the State of New York." A47 § 7.11 (emphasis added). The Merger Agreement, by contrast, provides that it "shall be governed by and construed in accordance with the laws of the State of Delaware." A119 § 13.5. As the obligation to bargain in good faith first appears in the Bridge Loan Agreement and is merely re-incorporated into the Merger Agreement, the Bridge Loan Agreement's choice of law provision ought to control.

Second, the Court of Chancery's ruling itself invokes the Bridge Loan Agreement substantially more than it does the Merger Agreement. In its post-trial opinion, the Court of Chancery relied on the Merger Agreement only for its requirement that the parties negotiate for a license agreement in good faith, and further for the proposition that PharmAthene expended effort in negotiating it in the expectation of receiving a license in ST-246. But the Bridge Loan Agreement also contained that requirement, and if the Court of Chancery's conclusion respecting PharmAthene's effort is true of the Merger Agreement, it is necessarily also true of the Bridge Loan Agreement. Ex. C, at *22. In addition, PharmAthene's provision of financial support to SIGA pursuant to the Bridge Loan Agreement (which SIGA paid back in full with interest) is a critical underpinning of the Court of Chancery's ruling that PharmAthene was entitled to relief under promissory estoppel. *Id*. at

*23, *27 ("PharmAthene itself had to raise capital to make [the $3 million] loan," and "justice would not be done by treating PharmAthene as a bank" (emphasis added)). It also provides the basis upon which the Court of Chancery awarded attorneys' fees to PharmAthene. *Id*. at *43. The Bridge Loan Agreement thus should control for choice of law purposes under § 187.

For PharmAthene's quasi-contractual claim, § 221 of the Restatement (Second) indicates that a court must apply the law of the state with the most significant relationship to the parties' claims. Rest. (Second) of Conflict of Laws § 221 & comment d (1971); *Landis* v. *Sci. Mgmt.*, 1991 WL 19848, at *3 (Del. Ch. Feb. 15, 1991) (applying § 221). That is overwhelmingly New York:

- The Bridge Loan Agreement designates New York law. A47 § 7.11.
- New York is SIGA's principal place of business. PharmAthene is based in Maryland. Ex. C, at *2.
- The critical negotiations for the various documents at issue took place in New York. Ex. C, at *6. None of the negotiations took place in Delaware.
- PharmAthene's purported assistance to SIGA (which, in part, constitutes the reliance that the Court of Chancery found gave rise to promissory estoppel) took place in New York, Maryland and other locations outside of Delaware. Ex. C, at *28; A673.
- PharmAthene performed the Bridge Loan Agreement by providing the funds specified (the remainder of the reliance that the Court of Chancery found supported promissory estoppel) in New York. A47.
- None of the actions of which PharmAthene complains occurred in Delaware.
- The contractual basis for the attorney fee award was the Bridge Loan agreement which, as noted above, designates New York Law. Ex. C, at *43; A47 §§ 7.5, 7.6.

The only factors supporting the application of Delaware law are that the parties are incorporated here, and that the Merger Agreement – the least important of the three documents at issue in this case – designates Delaware law. Plainly, the balance of factors indicates that New York law should apply.

Had the Court of Chancery applied New York law, as it should have, PharmAthene's recovery for breach of the obligation to negotiate

in good faith would be strictly limited to reliance damages. *See Goodstein*, 604 N.E.2d at 1359-61 (N.Y. 1992). In *Goodstein*, New York's highest court categorically rejected the plaintiff's plea for profits lost by the defendant's failure to negotiate in good faith. The court found that such expectation damages "would give the injured party the benefit of the bargain that was not reached. But if 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 (citations omitted) (emphasis in original). The court further explained that "[t]o allow the profits that plaintiff might have made under the prospective [contract] as the damages for breach of the exclusive negotiating agreements would be basing damages not on the exclusive negotiating agreements but on the prospective terms of a nonexistent contract which the [defendant] was fully at liberty to reject. It would, in effect, be transforming an agreement to negotiate for a contract into the contract itself." *Id*. at 1360-61. Because New York law applies, and because, under New York law, PharmAthene's recovery is limited to reliance damages, the equitable relief that the Court of Chancery awarded is inappropriate.

2. The Court of Chancery's Remedy Is Foreclosed in Delaware, Too

(a) The Court of Chancery cannot create a contract and order that it be specifically performed.

Even were it the case that Delaware law should govern here, and it does not, relief that gives the prevailing party the entire benefit of its expectations for breach of an agreement to negotiate in good faith is not available in Delaware.

In crafting its remedy, the Court of Chancery invented hypothetical contract terms despite virtually no evidence as to what the parties would have agreed to, or whether they would have reached agreement at all. Ex. C, at *38 ("PharmAthene would have accepted . . . a 50/50 profit split," and the parties would have agreed to "upfront and milestone payments . . . something in the range of $40 million."). The Court of Chancery then imposed the novel remedy of an "equitable payment stream" based on these conjectural terms. In other words, the remedy awarded here was essentially the Court of Chancery's guess as to what Pharm-Athene could have expected to receive had the parties completed their negotiations successfully and entered into the Court of Chancery's fictional contract.

"[N]o court can make a new contract for" parties who are unable to reach agreement. *Colvocoresses* v. *W.S. Wasserman Co.*, 28 A.2d

588, 589 (Del. Ch. 1942), *cited in Great-W. Investors* v. *Thomas H. Lee Partners*, 2011 WL 284992, at *13 n.79 (Del. Ch. Jan. 14, 2011). Even where reformation of a contract is sought, the court will not create a new contract for the parties; it may modify a written instrument only to conform to the parties' actual prior intent. *Bryant* v. *Way*, 2012 WL 1415529, at *12 (Del. Super. Apr. 17, 2012) (citing *In re Will of McCall*, 398 A.2d 1210, 1215 (Del. Ch. 1978)); 5 Pomeroy's Eq. Jur. (2d Ed.) § 2097. And a court has no authority to substantially change the terms of a contract negotiated between the parties, even when the change desired by the court would produce a "just" or "fair" result. *In re Appraisal of Enstar Corp.*, 604 A.2d 404, 414-15 (Del. 1992) (overturning Court of Chancery's decision reforming a contract to make equitable concession based on unilateral mistake that otherwise would have led to rescission of contract).

But that is exactly what the Court of Chancery did here. Disregarding the clear prohibition against making its own contract, the Court of Chancery invented terms that the parties never proposed or even considered. Ex. C, at *38. Specifically, the Court of Chancery found that "PharmAthene would have accepted a 50/50 profit split," despite the fact that PharmAthene repeatedly disavowed any indication that it was prepared to engage meaningfully with SIGA in negotiations. *Compare id. with id*. at *38 n.228 ("Olstein wrote . . . '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]'"). PharmAthene said in November that it would "consider" a 50-50 profit split only if the license fee and milestones of the LATS remained static. A602.

The Court of Chancery also found that, had they completed their negotiations successfully, the parties would have agreed to "upfront and milestone payments . . . something in the range of $40 million." *Id*. at *38. For this point, the Court of Chancery cites an internal document prepared by SIGA's then-controller, Ayelet Dugary, in October 2006, in which she calculated that SIGA's past and future expenses in developing ST-246 would total $39.66 million, and stated that this supported "an upfront license fee of $40 million." *Id*. at *40-41 (discussing A677). It was conjecture on the part of the Court of Chancery to infer that Dugary, who did not testify at trial, intended to encompass <u>all</u> payments from PharmAthene, including upfront, milestone, and all non-royalty payments in the LATS. *Id*. The only other piece of evidence the Court of Chancery cites is trial testimony that SIGA supposedly told PharmAthene at the November 6, 2006 meeting that SIGA "would be seeking upfront license fees in the range of $40-45 million." *Id*. at *38 n.229 (referring to A771 (Fasman)). In fact, SIGA's negotiator, Steven

Fasman, actually testified that he "didn't really want to engage . . . in a term by term discussion. . . . But I – I did say in response that I could see, given the changed circumstances, an up-front payment of $40-45 million or more as part of a – an up-front payment." A771 (emphasis added). Nor is there any evidence that PharmAthene ever considered agreeing to an upfront payment in the range of $40-45 million, or that PharmAthene had the ability to pay that amount. To the contrary, the merger had recently terminated in part because PharmAthene had failed to raise the lesser amount of $25 million. In fact, the only evidence, spelled out in a letter from PharmAthene's chief negotiator, which the Court of Chancery ignored, was that PharmAthene would not agree to any change in the upfront payments. A602.[9]

Finally, there is no evidence that either PharmAthene or SIGA would have accepted the *combination* of a $40 million payment and a 50-50 profit split, or that the parties would have reached agreement on all of the other essential terms missing from the LATS. Indeed, the Court of Chancery had to decide thirty issues arising just from the definition of "net sales" when it created its implementing order.

It is well settled that Delaware law forbids the award of speculative damages. *Greetham* v. *Sogima L-A Manager, LLC*, 2008 WL 4767722, at *18 (Del. Ch. Nov. 3, 2008) ("The law 'does not promote . . . speculative damages.'") (quoting *Ryan* v. *Tad's Enter., Inc.*, 709 A.2d 682, 699 (Del. Ch. 1996)). Where, as here, there is insufficient evidence to support damages, the law forbids a court to create a contract without any evidentiary basis in order to award damages. *CertainTeed Corp.* v. *Celotex Corp.*, 2005 WL 217032, at *14 (Del. Ch. Jan. 24, 2005) ("The law of this state, in general, prevents the enforcement of the term sheet as a contract if it is subject to future negotiations because it is, by definition, a mere agreement to agree."). *See also Cochran* v. *Nagle*, 1995 WL 819054, at *4 (Del. Ch. Feb. 27, 1995) ("I cannot impose a constructive trust over one half of the authorized common stock of [the company] on some speculative hindsight that . . . the 'fair' resolution would be to declare the individual parties should have joined together in the corporate form to pursue the business."). Here, the parties knew it

[9] At trial, Eric Richman, the President and CEO of PharmAthene, testified only that at the November 6, 2006 meeting between the parties, he "remember[ed] that $40 million [was] thrown out. [PharmAthene responded] we'd be willing to listen to that proposal." A810. Notably, the May 31, 2012 Final Order and Judgment relieves PharmAthene of any obligation to make any upfront payment, even of the amount that the Court of Chancery found PharmAthene would have agreed to make.

was a possibility that they would never reach agreement on a collaboration. *See* A831 (Wright). The conclusion that SIGA and PharmAthene would have come to any final agreement is thus speculative as a matter of law. It was another layer of impermissible speculation for the Court of Chancery to hypothesize what the expectations of the parties were, and then to invent a contract for the parties memorializing the Court of Chancery's speculations.

For the same reasons a court may not award money damages based on a hypothetical contract, "'it is a fundamental principle of equity that the remedy of specific performance will only be granted as to an agreement which is clear and definite and as to which there is no need to ask the court to supply essential terms.'" *Liquor Exch., Inc.* v. *Tsaganos*, 2004 WL 2694912, at *2 (Del. Ch. Nov. 16, 2004) (quoting *Weston Invs., Inc.* v. *Domtar Indus., Inc.*, 2002 WL 31011141, at *6 (Del. Super. Sept. 4, 2012)). Yet the "equitable payment stream" ordered here is equivalent to specific performance of a non-negotiated, entirely invented agreement as to which the Court of Chancery provided all essential terms. *See* Ex. C, at *38-42; Ex. E ("From [the parties'] competing forms of final orders and the parties' submissions to the Court thereafter, no less than thirty discrete points of disagreement are apparent"). Delaware law has long forbidden a court to create and then specifically enforce its own contract. "[T]he Court will not decree [specific performance] if the contract terms are unclear and indefinite – there must be no need for the Court to supply meaning to essential elements of the contract." *Mehiel* v. *Solo Cup Co.*, 2005 WL 5750634, at *7 (Del. Ch. May 13, 2005).

Yet, again, that is exactly what the Court of Chancery did here. The Court of Chancery effectively invented for the parties a contract that eliminated any requirement that PharmAthene provide upfront, milestone or royalty payments or any other assistance in the development or marketing of ST-246, and then additionally granted PharmAthene a royalty-like "equitable payment stream" pursuant to which PharmAthene will receive a windfall of a 50% share of profits after ST-246 has achieved $40 million in net profits. That remedy was the Court of Chancery's flawed approximation of the upfront payment that the Court of Chancery was "convinced" the parties would have agreed to. Having created this contract for the parties, the Court of Chancery then ordered them to specifically perform it. But even after the Court of Chancery's post-trial opinion setting out this contract, and its decision on motion for reconsideration, the parties continued to disagree on "no less than thirty discrete terms" in fashioning an implementing order, including disagreements on the calculation of the $40 million setoff, the definition of research and

development expenses, and even the definition of the "Product" that is the subject of this litigation. 2012 WL 214600, at *1-3. In ruling on these disagreements, the Court of Chancery wrote even more terms into the contract it had invented on its own, and guaranteed its continued involvement in the parties' relationship. *See* Ex. C, at *35 ("[B]lack-letter principles caution courts to avoid . . . an ongoing and onerous supervisory role"); *Ryan* v. *Ocean Twelve, Inc.*, 316 A.2d 573, 575 (Del. Ch. 1973) (specific performance not appropriate where, given "the apparent complexities of the situation and the disparity, duration, and nature of the work to be performed . . . [e]ffective enforcement by the Court . . . would be impractical, and, no doubt, improbable."); *Prestancia Mgmt. Grp., Inc.* v. *Va. Heritage Found., II LLC*, 2005 WL 1364616, at *4 (Del. Ch. May 27, 2005) (same).

The Court of Chancery's remedy was further improper because, even though it is as sweeping as specific performance, the Court of Chancery failed to apply the heightened evidentiary threshold for specific performance. *See, e.g., In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 53 (Del. Ch. 2001) ("clear and convincing" standard applies to actions for specific performance because "a compulsory remedy is not typical and should not be lightly issued"). The Court of Chancery found only that "the parties likely would have reached agreement on a transaction generally in accordance with the LATS." Ex. C, at *38 (emphasis added). Rather than "clear and convincing evidence," the Court of Chancery merely "inferred that [the parties' prior discussed] basic structure probably would not have changed had the parties negotiated in good faith," and that, because projections had increased by three-fold due to ST-246's interim success, "PharmAthene would have agreed to increase the aggregate amount of payments to SIGA by a corresponding multiple." Ex. D, at *4, *5.

For all of these reasons, not surprisingly, courts in other jurisdictions are almost uniformly hostile to expectation damages for a breach of the obligation to negotiate in good faith – they are simply far too speculative. Many jurisdictions refuse to enforce obligations to negotiate in good faith at all, including Florida (*Dep't of Corr.* v. *C&W Food Serv., Inc.*, 765 So. 2d 728, 729-30 (Fla. Dist. Ct. App. 2000)); Georgia (*Miami Heights LT, LLC* v. *Home Depot U.S.A., Inc.*, 643 S.E.2d 1, 3 (Ga. Ct. App. 2007)); Idaho (*Spokane Structures, Inc.* v. *Equitable Inv., LLC*, 226 P.3d 1263, 1268 (Idaho 2010)); Indiana (*Izynski* v. *Chi. Title Ins. Co.*, 963 N.E.2d 592, 598-99 (Ind. Ct. App. 2012)); Maryland (*Paramount Brokers, Inc.* v. *Digital River, Inc.*, 126 F. Supp. 2d 939, 949 (D. Md. 2000)); Michigan (*Ford Motor Co.* v. *Kahne*, 379 F. Supp. 2d 857, 869 (E.D. Mich. 2005)); Minnesota (*Lindgren* v. *Clearwater Nat'l Corp.*, 517

N.W.2d 574, 574 (Minn. 1994)); Mississippi (*Biloxi Firefighters Ass'n* v. *City of Biloxi*, 810 So. 2d 589, 594 (Miss. 2002)); Missouri (*Smith* v. *Hammons*, 63 S.W.3d 320 (Mo. Ct. App. 2011)); Montana (*Holter Lakeshores Homeowners Ass'n, Inc.* v. *Thurston*, 207 P.3d 334, 338 (Mont. 2009)); Nebraska (*168th & Dodge, LP* v. *Rave Reviews Cinemas, LLC*, 501 F.3d 945, 950-51 (8th Cir. 2007)); Nevada (*City of Reno* v. *Silver State Flying Serv., Inc.*, 438 P.2d 257, 261 (Nev. 1968)); North Dakota (*Stout* v. *Fisher Indus., Inc.*, 603 N.W.2d 52, 56 (N.D. 1999)); Ohio (*Westwinds Dev. Corp.* v. *Outcalt*, 2009 WL 1741978, at *5 (Ohio Ct. App. June 19, 2009)); South Dakota (*LaMore Rest. Grp., LLC* v. *Akers*, 748 N.W.2d 756, 761 (S.D. 2008)); Tennessee (*S. Style Shops, Inc.* v. *Mann*, 4 S.W.2d 959, 960 (Tenn. 1928)); Texas (*Southern* v. *Goetting*, 353 S.W.3d 295, 300 (Tex. App. 2011)); Virginia (*Va. Power Energy Marketing, Inc.* v. *EQT Energy, LLC*, 2012 WL 2905110, at *4 (E.D. Va. July 16, 2012)); West Virginia (*Ridgeway Coal Co. Inc.* v. *FMC Corp.*, 616 F. Supp. 404, 408 (S.D. W. Va. 1985)); Wisconsin (*Hellenbrand* v. *Goodman*, 667 N.W.2d 377, ¶ 40 (Table) (Wis. 2003)); and the District of Columbia (*NRDC* v. *EPA*, 464 F.3d 1, 9-10 (D.C. Cir. 2006)).

Others jurisdictions limit damages for such claims strictly to the injured party's reliance interest, including Alaska (*Valdez Fisheries Dev. Ass'n, Inc.* v. *Alyeska Pipeline Serv. Co.*, 45 P.3d 657, 667 (Alaska 2002)); Arizona (*Narramore* v. *HSBC Bank USA, N.A.*, 2010 WL 2732815, at *4-5 (D. Ariz. July 7, 2010)); California (*Copeland* v. *Baskin Robbins U.S.A.*, 117 Cal. Rptr. 2d 875, 883-84 (Ct. App. 2002)); Illinois (*Sierra Club* v. *Franklin Cty. Power of Ill., LLC*, 546 F.3d 918, 933-34 (7th Cir. 2008)); Massachusetts (*Dixon* v. *Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 336, 349 (D. Mass. 2011)); New York (*Goodstein*, 604 N.E.2d 1356); Pennsylvania (*B&P Holdings I, LLC* v. *Grand Sasso, Inc.*, 114 F. App'x 461, 466 (3d Cir. 2004)); and Puerto Rico (*Shelley* v. *Trafalgar House Pub. Ltd. Co.*, 977 F. Supp. 95, 100 (D. P. R. 1997)).

There is no authority for the notion that something more than reliance damages should be available here. As shown above, there is no evidence, let alone evidence that is clear and convincing, that the parties would have reached an agreement, or on what terms that agreement would have been reached. Nor is there any contention that PharmAthene substantially performed under the LATS – it made no upfront or royalty payment to SIGA, and the Court of Chancery found that PharmAthene had not proven the value of any help it supplied to SIGA and that the economic cost of the "operational support" it provided was "*de minimis*." Ex. C, at *35. The remedy the Court of Chancery awarded is contrary to Delaware law and the weight of precedent in other states.

(b) *Greka* does not lead to a different result.

The Court of Chancery relied heavily on the decision in *RGC International Investors, LDC* v. *Greka* in deciding its award, but nothing in *Greka* justifies the Court of Chancery's ruling in this case. 2001 WL 984689 (Del. Ch. Aug. 22, 2001). *Greka* arose when an acquirer in a merger transaction bargained for the preferred stockholder of the target company to relinquish certain rights in exchange for post-merger payment. Although the acquirer and the holder of the preferred stock had agreed on the amount of the post-merger payment, the final documentation of the stockholders' relinquishment of rights in exchange for cash payment was not completed before the merger closed. The preferred stockholder forbore from exercising its rights, relying on the promise that the parties would negotiate a final agreement after closing. Having already received the benefit of this bargain, the acquirer refused to perform after closing. The court awarded a remedy that it described as "expectation interest" equal to the amount of the post-merger payment. *Greka*, 2001 WL 984689, at *14-16.

Critically, in *Greka*, the parties had already agreed upon the essential terms of their deal. 2001 WL 984689, at *16 ("RGC asks only to be awarded 'exactly what Greka agreed to give RGC in the written Term Sheet . . ., exactly when Greka should have given it, and at the rate . . . that Greka agreed [to] pay it.") (emphasis in original and quotation marks omitted). The Court was thus not required to speculate as to what the parties would have agreed to, as it did here. In addition, in *Greka*, the defendant already had received the full consideration under the agreement. *Ramone* v. *Lang*, 2006 WL 905347, at *17 n.90 (Del. Ch. Apr. 3, 2006) (explaining holding of *Greka*). The damage award in *Greka* was therefore not actually "expectation damages." The *Greka* plaintiffs had already lost the full value of their rights under their shares. Thus, the expectations of the plaintiffs, or the cash value of those rights, and the value of the rights already relinquished in reliance on the intended bargain, were identical. "Put another way, the best measure of what RGC gave up (*i.e.*, its lost reliance interest) is the price that these two aggressive adversaries put on it after arms-length bargaining." *Greka*, 2001 WL 984689, at *16.[10]

In this case, by stark contrast, PharmAthene never performed

[10] *See also Titan Inv. Fund II, L.P.* v. *Freedom Mortg. Corp.*, 2012 WL 1415461, at *10-11 (Del. Super. Mar. 27, 2012) (finding breach of obligation to negotiate in good faith, but essentially limiting recovery to reliance damages).

any of the terms of the LATS. *Supra* pp. 6-7. Pursuant to the LATS, PharmAthene was to provide funds for research and development at SIGA, as well as an upfront licensing payment of $2 million, plus $4 million in additional fixed payments and further milestone payments. A2. None of this occurred, yet, as explained above, the remedy the Court of Chancery invented with no evidentiary basis awards PharmAthene a windfall of nearly half of the value of ST-246 in exchange for no upfront cost, no risk and no effort. In addition, unlike the plaintiffs in *Greka*, PharmAthene bears no risk of loss because SIGA has already repaid the Bridge Loan in full with interest. A832 (Wright). The undisputed evidence demonstrates the meager efforts PharmAthene made cost it approximately $205,000. A590. The relief – half of the profits on potentially billions of dollars of sales – is thus completely disproportionate to any effort or cost expended by PharmAthene. As the Court of Chancery noted at the close of trial: "By the same token, are there huge equities on PharmAthene's side? Not really. PharmAthene put a couple million dollars up for this thing and they did it in the form of a loan. So they had to go out and actually raise the money. Well, big deal . . . ." (A834).

3. The Law of Constructive Trust Does Not Permit a Court to Ignore the Prohibition Against Speculative Damages and Award an Equitable Remedy on a Purely Legal Claim

As discussed above, promissory estoppel is not available because of the existence here of fully integrated contracts. Left with only a legal claim for breach of contract, the broad equitable relief awarded by the Court of Chancery is inappropriate. *See, e.g.*, *Richard Paul, Inc.* v. *Union Improvement Co.*, 91 A.2d 49, 54 (Del. 1952) (court of equity cannot use equitable principles "to rewrite the plaintiff's legal rights"). And, as discussed above, expectation damages are entirely speculative, and PharmAthene has not demonstrated entitlement to such remedy.

The Court of Chancery attempted to side-step these obvious limitations on its remedial powers by invoking its "remedial flexibility [in] depart[ing] from strict application of the ordinary forms of relief" by creating the novel remedy of a constructive trust/equitable payment stream. Ex. D, at *3. But it is well settled that equitable relief is not available where there is adequate relief to be had at law. *Kennett* v. *Carlyle Johnson Mach. Co.*, 2002 WL 1358755 (Del. Ch. June 17, 2012); *see also Mass. Mut. Life Ins. Co.* v. *Certain Underwriters at Lloyd's of London*, 2010 WL 3724745 (Del. Ch. Sept. 24, 2010) (no equitable jurisdiction where adequate remedy is available at law).

If PharmAthene were to prevail on its claim for breach of the obligation to negotiate in good faith, it has an adequate remedy at law in the form of reliance damages. That those damages would be "*de minimis*," as the Court of Chancery found, in comparison to the anticipated profitability of ST-246 (Ex. C, at *35), is not a basis for awarding equitable relief on a purely legal claim. *See, e.g.*, *Prestancia Mgmt. Grp.*, 2005 WL 1364616, at *6 (declining to award equitable relief on a legal claim where equitable prerequisites not met, even where recovery would have been far larger had equitable remedy been awarded).

Nor is the remedy imposed here even actually a constructive trust. A constructive trust is imposed by the Court of Chancery to "compel a person who has fraudulently or unfairly obtained or asserted title to property to hold such property in trust for the rightful owner and to convey it to him." Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 12.07[b] (2012). There is no question that SIGA has rightful title to ST-246 and the supporting patents. It was never contemplated that title to ST-246 would pass to PharmAthene; at most, PharmAthene would have acquired licensing rights to ST-246. Similarly, even a theoretical right to royalties on future sales that might have inured to PharmAthene if a deal actually had been reached is not a property right that can be enforced through a constructive trust.

Further, a constructive trust is appropriate only where the defendant has enriched itself at the expense of another "by virtue of fraudulent, unfair or unconscionable conduct." *Hogg* v. *Walker*, 622 A.2d 648, 652 (Del. 1993); *Greenly* v. *Greenly*, 49 A.2d 126, 129 (Del. Ch. 1946) ("Some fraudulent or unfair and unconscionable conduct is essential"). There has been no finding of fraudulent, unfair, or unconscionable conduct that could support imposition of a constructive trust. Even on the facts as the Court of Chancery found them, SIGA did no more than advance an opening negotiating position consistent with its interests, and it expended considerable effort in creating the 102-page Draft LLC Agreement as an opening position in negotiations once the Merger Agreement terminated. After SIGA's initial overture, PharmAthene indicated that it was open to different payment structures, but then refused to negotiate terms and instead filed suit, prior to the expiration of the 90-day exclusive negotiating period.[11]

[11] In addition, a constructive trust typically is imposed to remedy the violation of a fiduciary relationship. *See Prestancia Mgmt. Grp.*, 2005 WL 1364616, at *6. But here there is no fiduciary relationship – to the

Perhaps most importantly, the relief awarded here provides an unfair windfall to PharmAthene. Its terms are inequitable because they reward PharmAthene with a 50% share of profits from the sale of ST-246 while eliminating any upfront contribution, or the responsibility and risk of shepherding a drug candidate through the development cycle, and thus any risk to PharmAthene that the drug will not be profitable.

Finally, the remedy here is further inappropriate because it effectively awards PharmAthene a "reasonable royalty." The Court of Chancery correctly ruled that PharmAthene is not entitled to a "reasonable royalty" because this patent measure of damages is available only in patent infringement cases. Ex. B, at *13.

4. Reliance Damages Are the Only Available Remedy

As set forth in Part I, *supra*, SIGA did not breach its contractual obligation to negotiate in good faith. Nor could PharmAthene claim a right to promissory estoppel, as set forth in Part II, *supra*. Nevertheless, should this Court disagree, for the reasons stated above, the only appropriate measure of damages is under a reliance damage theory. *Goodstein*, 604 N.E.2d at 1362 (limiting plaintiff to reliance damages because, "where the claims are founded only on an agreement to negotiate – awarding plaintiff lost profits based on the [expectation interest] would be . . . irrational and illogical"); *Ramone*, 2006 WL 905347.

Reliance damages in this case are calculated as the value to SIGA of the operational support provided by PharmAthene, measured by the cost of the services provided or, in the case of a conscious wrongdoer, by the value of those services to the receiving party. Ex. C, at *29 (citing Restatement (Third) of Restitution and Unjust Enrichment § 49(3), §51(4) (2011)). At trial, SIGA introduced evidence that those services cost no more than $205,000, including analytical services paid for by PharmAthene for a period of one year, and the hiring of the director of PharmAthene's Scientific Advisory Board. A590. PharmAthene proffered no evidence to rebut this determination of reliance damages. The Court of Chancery accepted the uncontested trial testimony of SIGA's expert in holding that reliance damages "would be on the order of a few hundred thousand dollars." Ex. C, at *29.[12] Moreover, as the

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contrary, the parties are sophisticated companies that negotiated at arm's length.

[12] To the extent PharmAthene claims SIGA was unjustly enriched by PharmAthene's alleged assistance to SIGA under the Bridge Loan

Court of Chancery itself noted in rejecting PharmAthene's unjust enrichment claim, no causal relationship was ever established at trial between any assistance PharmAthene provided to SIGA and any increase in the value of ST-246. Ex. C, at *29. Without that connection, conferring half of ST-246's value on PharmAthene is wildly excessive. Thus, SIGA respectfully requests that, if this Court determines PharmAthene is entitled to damages, those damages be limited to the uncontested amount identified above.

Agreement, no damages are available because that fully integrated contract alone "provides the measure of PharmAthene's rights." Ex. C, at *28. To the extent the Court of Chancery based damages on its finding that SIGA was "enriched" because SIGA will now control the patent and its development, marketing, and related patents and materials, that is impermissible, and logically faulty. First, the Court of Chancery correctly rejected PharmAthene's claim for unjust enrichment because Pharm-Athene failed to show the extent of any enrichment. *Id.*, at *28-29. In addition, this purported "enrichment" – which the Court of Chancery cites as a basis for imposing an equitable lien – is not unjust. To the contrary, it was a possible result expressly contemplated and taken into account by the parties, *i.e.*, that negotiations could fail and SIGA would control the drug.

IV. PharmAthene Is Not Entitled to Attorneys' Fees or Costs

A. Question Presented: Did the Court of Chancery err in awarding PharmAthene its attorneys' fees, expenses, and expert witness costs? This issue was preserved for appeal. (*See* A1111-1116.)

B. Standard of Review: Attorneys' fees awards are ordinarily reviewed for abuse of discretion. *Mahani* v. *EDIX Media Grp., Inc.*, 935 A.2d 242, 245 (Del. 2007); *Kaung* v. *Nat'l Corp.*, 884 A.2d 500, 506 (Del. 2005). The lower court's application of legal principles in making its fee determination, however, is subject to *de novo* review. *See Kaung*, 884 A.2d at 508; *Alaska Elec. Pension Fund* v. *Brown*, 941 A.2d 1011, 1015 (Del. 2007).

C. Merits: The Court of Chancery erroneously awarded PharmAthene one-third of its attorneys' fees and expert witness expenses based on a fee-shifting provision in the Bridge Loan Agreement triggered by SIGA's alleged failure to negotiate in good faith, and on the bad faith exception to the American Rule. To the extent the Court finds that SIGA did not breach its obligation to negotiate in good faith is overturned, the award of attorneys' fees and costs should be overturned.

It should also be overturned because there is no basis for the conclusion that SIGA's conduct justified invoking the bad faith exception. Shifting fees may be warranted by the losing party's pre-litigation conduct, but "in only the most egregious instances of fraud or overreaching," which is plainly not present here. Ex. C, at *43 (quoting *Arbitrium (Cayman Is.) Handels AG* v. *Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997)). The Court of Chancery found that SIGA acted "egregious[ly]" by "insist[ing] . . . [that the upfront, deferred, and milestone payments] be increased to an astronomical $335 million," and that the royalties payments also be increased. *Id*. at *44 (emphasis added). SIGA did no such thing. The uncontroverted evidence shows that SIGA did no more than propose, as an opening position, terms that differed from the LATS. There is no trace of fraud, egregious conduct, or overreaching. Accordingly, to the extent it relies on the bad faith exception, the Court of Chancery's award of attorneys' fees and costs should be reversed.

Finally, to the extent the Court finds that PharmAthene is limited to reliance damages, PharmAthene should not be permitted to recover for fees and expenses in the amount of approximately $2.4 million when the damages award is limited to "a few hundred thousand dollars." PharmAthene incurred an excessive amount in fees and expenses because it hoped for a windfall decision, which it received. It should not be rewarded for such profligacy.

Conclusion

For the foregoing reasons, the Final Order and Judgment of the Court of Chancery should be reversed in relevant part and judgment entered in SIGA's favor.

Respectfully submitted,

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Dated: August 2, 2012

EXHIBIT A

Not Reported in A.2d, 2008 WL 151855 (Del.Ch.)
(Cite as: 2008 WL 151855 (Del.Ch.))

Court of Chancery of Delaware.
PHARMATHENE, INC., a Delaware corporation, Plaintiff,
v.
SIGA TECHNOLOGIES, INC., a Delaware corporation, Defendant.

Civil Action No. 2627-VCP.
Submitted: June 1, 2007.
Decided: Jan. 16, 2008.

A. Richard Winchester, Esquire, Christopher A. Selzer, Esquire, McCarter & English, LLP, Wilmington, Delaware; Roger R. Crane, Esquire, Nixon Peabody, LLP, New York, New York, Attorneys for Plaintiff.

Andre G. Bouchard, Esquire, Bouchard Margules & Friedlander, P.A., Wilmington, Delaware; Harold P. Weinberger, Esquire, Jennifer L. Rochon, Esquire, Seth F. Schinfeld, Esquire, Kramer Levin Naftalis & Frankel LLP, New York, New York, Attorneys for Defendant.

MEMORANDUM OPINION

PARSONS, Vice Chancellor.

***1** This is essentially an action for breach of contract. Plaintiff is a company with extensive experience in developing and launching pharmaceutical products. According to the Complaint, before the events that give rise to this dispute, Defendant was a "struggling biodefense pharmaceutical company with little money, no experienced management, no development, regulatory, clinical, government relations, or marketing staff" and an unapproved and early stage drug that might become an important weapon against smallpox. Beginning in late 2005, the parties negotiated a framework for a collaboration between them for developing and marketing this drug. In January 2006, Plaintiff and Defendant memorialized the major terms of that framework in a two page term sheet that bore the legend "Non Binding Terms." Over the next six months, Plaintiff performed its obligations under the contemplated collaboration and the parties entered into several signed agreements. Two of the agreements contained a provision obligating the parties in circumstances now present to "negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth" in the two page term sheet. In October 2006, by which time the drug had achieved several significant success thresholds, Defendant offered to negotiate a definitive license agreement in keeping with the general framework of the term sheet, but on economic terms far different and more favorable to Defendant.

Plaintiff's Complaint asserts claims for breach of a binding license agreement and a contractual duty to negotiate such an agreement in good faith, promissory estoppel, and unjust enrichment. Contending that it never agreed to be bound by the term sheet, Defendant has moved to dismiss all the counts in the Complaint for failure to state a claim.

For the reasons stated, I conclude the allegations in the Complaint are sufficient to support a preliminary finding that the relevant documents and agreements are ambiguous as to whether the parties intended the term sheet to be binding when they incorporated it into their later agreements. Under one possible construction, but not the only one, Defendant would be obligated to enter into a license agreement with terms consistent with those specified in the term sheet. I also find the circumstances of the parties' communications and conduct conceivably could support Plaintiff's alternative claims for promissory estoppel and unjust enrichment. Accordingly, I deny Defendant's motion to dismiss.

I. BACKGROUND

A. Facts

Plaintiff, PharmAthene, Inc. ("PharmAthene"), is a Delaware corporation with its principal place of business in Annapolis, Maryland. Defendant, SIGA Technologies, Inc. ("SIGA"), is a Delaware corporation with its principal place of business in New York, New York. Both PharmAthene and SIGA are pharmaceutical companies.

In 2004 SIGA acquired the technology for a product now known as SIGA-246, an orally administered anti-viral drug for the treatment of smallpox. [FN1] At that time, the viability of SIGA-246, its potential uses, safety, and efficacy, and the possibility of its obtaining government approvals and government contracts were all unknown. There was a possibility that, with cash, marketing, and technical knowledge, SIGA-246 might become an important weapon against smallpox and therefore extremely valuable. There was also the possibility that any money or effort invested in SIGA-246 would be for naught.

FN1. Unless otherwise indicated, the facts recited in this Memorandum Opinion are drawn from the allegations in the Complaint.

*2 By late 2005, SIGA experienced difficulties developing SIGA-246 and bringing it to market. Around this time, SIGA and PharmAthene discussed a possible collaboration.[FN2] Through an exchange of oral and written communications, SIGA and PharmAthene negotiated a framework agreement for their collaboration regarding the development and commercialization of SIGA-246.

FN2. Earlier, in or about December 2003, SIGA also held discussions with PharmAthene concerning a potential collaboration. SIGA had never developed or commercialized a drug, while PharmAthene and its executives had developed and launched over 25 pharmaceutical products.

1. The License Agreement Term Sheet

On January 26, 2006, the parties memorialized their agreement to collaborate in a two page document entitled "SiGA/PharmAthene Partnership," referred to in the Complaint as the "License Agreement Term Sheet" (the "LATS").[FN3] The LATS describes the parties' objective as: "To establish a partnership to further develop & commercialize SIGA-246 for the treatment of Smallpox and orthopox related infections and to develop other orthopox virus therapeutics." [FN4] The LATS also sets forth a framework for, among other things, patents covered, licenses, license fees, and royalties. The LATS is not signed and contains a legend in the footer of each page that states "Non Binding Terms."

FN3. The LATS is in the form of a table that includes the following headings: objective, fields, products, territory, patents, know-how, materials, licenses, R & D committee, license fee, deferred license fee, milestones, and royalties. Decl. of Harold P. Weinberger in Supp. of Mot. to Dismiss Pl.'s Compl. ("Weinberger Decl."), Ex. A, the LATS.

FN4. The LATS at 1.

2. Letter of Intent and Annexed Merger Term Sheet

The Complaint alleges that pursuant to its contractual obligations to work cooperatively to develop, secure approval for, and market SIGA-246, PharmAthene expended funds, transferred information, and provided management and technological know-how to SIGA. Over the next ten months, PharmAthene pushed for, modified, and funded clinical trials of SIGA-246, evaluated and recommended manufacturers, assisted and advised on quality control and quality assurance, and was in constant communication with SIGA.

As the parties' collaboration continued, SIGA suggested to PharmAthene that the companies consider a merger. On or about March 9, 2006, the

parties signed a Letter of Intent with an annexed Merger Term Sheet.[FN5] The Letter of Intent stated that it was not an offer to complete a merger, but rather an "indication of [the parties'] intention to consummate" a merger between SIGA and PharmAthene.[FN6] In the Letter of Intent, the parties agreed to "negotiate in good faith" and "use their best efforts" to execute a definitive merger agreement.

FN5. *See* Weinberger Decl., Ex. B, the Letter of Intent and annexed Merger Term Sheet.

FN6. The Letter of Intent at 1.

The annexed Merger Term Sheet for the merger of PharmAthene into SIGA contained clauses concerning, among other things: tax treatment, consideration, bridge financing, license agreement, financing, and its binding nature. According to the Merger Term Sheet, upon any termination of it or a definitive merger agreement, the parties agreed to negotiate in good faith the terms of a definitive License Agreement in accordance with the terms set forth in the LATS.[FN7] Additionally, with the exception of the Fiduciary Out, Expenses, and Exclusivity sections, the Merger Term Sheet states that it "is non-binding and only an expression of interest and is subject in its entirety to the negotiation and execution of a definitive Merger Agreement." [FN8]

FN7. The Merger Term Sheet at 4.

FN8. *Id.* at 6.

3. The Bridge Loan Agreement

***3** In March 2006, SIGA required capital which PharmAthene agreed to provide. On March 20, 2006, the parties entered into a Bridge Note Purchase Agreement, referred to in the Complaint as the Bridge Loan Agreement, pursuant to which PharmAthene loaned SIGA $3 million. The Bridge Loan Agreement provided that the $3 million would be used for "(i) expenses directly related to the development of SIGA 246, (ii) expenses relating to the Merger and (iii) corporate overhead." [FN9] PharmAthene made the bridge loan in reliance on the parties' agreements for a continuing relationship with respect to SIGA-246, whether the relationship ultimately took the form of a merger under a merger agreement or a license agreement in accordance with the LATS.

FN9. Weinberger Decl., Ex. C, the Bridge Loan Agreement, § 2.6.

The Bridge Loan Agreement explicitly recognized, however, the possibility that the parties ultimately might not agree on either a merger or a license agreement. Specifically, section 2.3 provides that:

> Upon any termination of the Merger Term Sheet ..., termination of the Definitive Agreement relating to the Merger, or if a Definitive Agreement is not executed ..., 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 attached as Exhibit C and [SIGA] agrees for a period of 90 days during which the definitive license agreement is under negotiation, it shall not, directly or indirectly, initiate discussions or engage in negotiations with any corporation, partnership, person or other entity or group concerning any Competing Transaction without the prior written consent of the other party or notice from the other party that it desires to terminate discussions hereunder.[FN10]

FN10. *Id.* § 2.3.

The Bridge Loan Agreement further states: "This Agreement and the purchase documents and the rights and obligations of the parties under this Agreement and the purchase documents shall be governed by, and construed and interpreted in accordance with, the laws of the State of New York, without regard to principles of conflicts of laws." [FN11]

FN11. *Id.* § 7.11 (emphasis omitted).

4. The Merger Agreement

Subsequently, SIGA and PharmAthene negotiated and agreed on the terms of a merger agreement. During these negotiations, SIGA represented to PharmAthene that the merger was a sound business decision, because SIGA had reviewed the facts and concluded that the depth, experience, and diversity of PharmAthene's management could assist in bringing SIGA-246 to market and that PharmAthene had a broad investment base and experience in raising substantial amounts of capital which would provide an immediate value to SIGA and its shareholders. On June 8, 2006, the parties executed the Merger Agreement. Similar to § 2.3 of the Bridge Loan Agreement, § 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 attached as ***Exhibit H*** and SIGA agrees for a period of 90 days during which the definitive license agreement is under negotiation, it shall not, directly or indirectly, initiate discussions or engage in negotiations with any corporation, partnership, person or other entity or group concerning any Competing Transaction ... without the prior written consent of Pharmathene or notice from Pharmathene that it desires to terminate discussions hereunder. [FN12]

FN12. Weinberger Decl., Ex. D, the Merger Agreement, § 12.3.

*4 Section 13.3, the further action clause, provides: "Each of the parties hereto shall use such party's best efforts to take such actions as may be necessary or reasonably requested by the other parties hereto to carry out and consummate the transactions contemplated by this Agreement." [FN13] Further, under § 12.4, the good faith and best efforts provisions of the Merger Agreement, set forth in §§ 12.3 and 13.3, will survive its termination. Additionally, § 13.5 states that the Merger Agreement "shall be governed by and construed in accordance with the laws of the State of Delaware applicable in the case of agreements made and to be performed entirely within such State." [FN14]

FN13. *Id.* § 13.3.

FN14. *Id.* § 13.5.

5. Events following the Merger Agreement

After the Merger Agreement, PharmAthene and SIGA continued to collaborate. Over the course of the parties' dealings, SIGA-246 achieved several significant success thresholds. In its Complaint, PharmAthene avers that, throughout the course of their dealings, SIGA and its representatives continued to assure PharmAthene that "it would proceed with the Merger or that the parties' relationship would continue, as it had been, in accordance with the terms of their agreement and the [LATS]." [FN15]

FN15. Compl. ¶ 39.

While the parties continued to collaborate, either party could terminate the Merger Agreement if the closing did not occur on or before September 30, 2006. As that date approached, PharmAthene sent SIGA a letter requesting an extension. SIGA never responded. At or about this time, the parties learned the clinical trials of SIGA-246 showed signs of great success, and would demonstrate 100% protection against smallpox in primates, even when administered after exposure. According to PharmAthene, its capital contributions, management, know-how, collaborative efforts on behalf of SIGA-246, and fulfillment of its contractual undertakings greatly contributed to this success of SIGA-246.

On October 4, 2006, SIGA sent PharmAthene a notice terminating the Merger Agreement on the ground that the September 30 deadline had passed.

Between October 6 and October 12, 2006, PharmAthene attempted to contact SIGA regarding the LATS and the parties' ongoing relationships, but received no response. On October 12, PharmAthene sent to SIGA for execution a definitive License Agreement, ostensibly in accordance with the terms of the LATS. On October 13, 2006, SIGA responded that it would review the draft by October 16 and get back to PharmAthene.

On October 18, 2006, SIGA publicly announced the results of its clinical trials showing that SIGA-246 "completely prevents smallpox disease in [a] preliminary primate trial" even when administered after exposure.[FN16] SIGA's stock soared. The next day, SIGA informed PharmAthene that it had obtained an additional $9 million in a private placement and wished to pay back the Bridge Loan.

FN16. *Id.* ¶ 50.

Responding to PharmAthene's requests for action on the License Agreement, SIGA proposed the parties meet on November 6, 2006 to engage in a "robust discussion." [FN17] When they met, SIGA stated that it did not consider the LATS binding, and that the terms reflected in that document no longer were acceptable. PharmAthene disagreed. Next, SIGA proposed to present and PharmAthene agreed to consider a formal partnership proposal.

FN17. *Id.* ¶¶ 52-53.

***5** On November 21, 2006, SIGA forwarded to PharmAthene a 102-page document, entitled "Limited Liability Company Agreement." According to PharmAthene, this document completely ignored the LATS. For example, the upfront payment required for a license of SIGA-246 increased from $6 million in the LATS to $100 million; the milestone payments increased from $10 million to $235 million; and SIGA's royalty percentage doubled. After reviewing the Limited Liability Company Agreement, PharmAthene disputed SIGA's claim that the LATS was not binding, but offered to continue to negotiate in good faith a license agreement with the terms set forth in the LATS and to consider additional terms consistent with the LATS.

In a letter to PharmAthene, dated December 12, 2006, SIGA stated further discussions about a potential partnership would not be fruitful if the parties could not meet "without preconditions" relating to the LATS, the Bridge Loan Agreement, and the Merger Agreement. PharmAthene then commenced this action on December 20, 2006.

B. Procedural History

PharmAthene's Complaint asserts seven claims for relief. The first four counts allege the existence of a contract between PharmAthene and SIGA either in the form of a license agreement in accordance with the terms of the LATS or an enforceable obligation to execute such a license agreement. Count one, for example, essentially seeks specific performance. It alleges PharmAthene offered SIGA a "definitive license agreement" in accordance with the LATS, the Bridge Loan Agreement, and the Merger Agreement and seeks an order directing SIGA to execute that license agreement or such other license agreement in accordance with the terms of the referenced documents as the court directs. Counts two through four also rely on the LATS, the Bridge Loan Agreement, and the Merger Agreement, among other things. Count two seeks a declaratory judgment that SIGA is obligated to execute a license agreement as in count one and "is precluded from entering into a license agreement for SIGA-246 with any third party or otherwise exploiting the benefits of SIGA-246 developed in collaboration with PharmAthene." Counts three and four both sound in breach of contract and seek damages. Count three asserts SIGA and PharmAthene, through the referenced documents and their conduct, entered into an enforceable license agreement, and SIGA breached that agreement. The alleged breach in count four is of SIGA's obligation to execute a definitive license agreement in accordance with the LATS and other referenced documents.

As to the remaining counts of the Complaint,

PharmAthene also seeks damages for breach of contract in count five. The alleged breach, however, is of SIGA's express duty under the Bridge Loan Agreement and the Merger Agreement "to negotiate in good faith towards execution of 'a definitive license agreement in accordance with the terms set forth' in the [LATS]" and its duty under the Merger Agreement to use its "best efforts ... to carry out and consummate the transactions contemplated" by the Merger Agreement, which included the execution of a definitive license agreement. PharmAthene seeks relief in count six on a theory of promissory estoppel, and in count seven on a theory of unjust enrichment.

***6** On January 9, 2007, SIGA moved to dismiss the Complaint in its entirety pursuant to Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted.[FN18] After considering the parties' briefing and argument on SIGA's motion to dismiss, this is the Court's ruling on that motion.

FN18. SIGA also moved to stay discovery pending resolution of its motion to dismiss. I granted that motion over PharmAthene's objections on March 8, 2007. *PharmAthene, Inc. v. SIGA Techs., Inc.*, C.A. No. 2627-VCP, at 9 (Del. Ch. Mar. 8, 2007) (TRANSCRIPT).

II. ANALYSIS

A. Standard for Dismissal under Rule 12(b)(6)

The standard for dismissal pursuant to Rule 12(b)(6) for failure to state a claim is well settled. A court will grant the motion only if it concludes, after accepting all well-pled factual allegations of the complaint and drawing all reasonable inferences in favor of the nonmoving party, that the "plaintiff would not be entitled to recover under any reasonably conceived set of circumstances susceptible of proof." [FN19] A court need not accept every interpretation of the allegations proposed by the plaintiff; instead, a court will accept those "reasonable inferences that logically flow from the face of the complaint." [FN20] Additionally, on a motion to dismiss, a court may consider documents that are "integral to or are incorporated by reference into the complaint." [FN21]

FN19. *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del.2006) (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del.2002)).

FN20. *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del.2001).

FN21. *In re Lukes Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch.1999); *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del.1995).

Consistent with the standard for assessing a Rule 12(b)(6) motion to dismiss, I have not considered the affidavit of Eric Richman. In support of its opposition to SIGA's motion, PharmAthene submitted the affidavit of Richman, its Senior Vice-President for Business Development & Strategic Planning. Under Rule 12(b)(6), however, the Court may not consider matters outside the pleadings when assessing a motion to dismiss for failure to state a claim. The only exceptions to this prohibition relate to documents that either are integral to a plaintiff's claim and incorporated into the complaint or are not being relied upon to prove the truth of their contents.[FN22] The Richman affidavit does not fall under either exception.

FN22. *See Vanderbilt Income & Growth Assocs. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del.1996).

B. Choice of Law

Before applying the 12(b)(6) standard, the Court must determine, as a preliminary matter, which state's substantive law governs Plaintiff's claims. SIGA argues New York law governs, while PharmAthene contends Delaware law applies.

Delaware applies the most significant relationship test from the Restatement (Second) of Conflicts of Laws.[FN23] Under the most significant re-

lationship test, in a contract action, courts consider: (1) the place of contracting; (2) the place of negotiation of the contract; (3) the subject matter of the contract; and (4) the domicile, residence, nationality, place of incorporation, and place of business of the parties to the contract.[FN24] Unjust enrichment and promissory estoppel claims are governed by the same analysis.[FN25]

FN23. *See Travelers Indem. Co. v. Lake,* 594 A.2d 38, 47 (Del.1991). "As the forum state, Delaware must apply its own choice of law rule." *Nat'l Acceptance Co. of Cal. v. Mark S. Hurm, M.D., P.A.,* 1989 WL 70953, at *2 (Del.Super. June 16, 1989). Under the most significant relationship test, courts consider seven broad policy considerations: (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relevant interests of those states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability, and uniformity of result; and (7) ease in the determination and application of the law to be applied. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145(1) (1997) (hereinafter "REST.2D CONFL. OF LAWS") (citing REST.2D CONFL. OF LAWS § 6 (1971)).

FN24. *See Feinberg v. Saunders, Karp & Megrue, L.P.,* 1998 WL 863284, at * 7 (D.Del. Nov. 13, 1998) (discussing REST.2D CONFL. OF LAWSS § 188(2) (1971)).

FN25. *See id.*

Where a contract includes a choice of law provision, the Restatement (Second) of Conflicts of Laws § 187(1) states that "[t]he law of the state chosen by the parties ... will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." [FN26] The choice of law provision will govern even when the issue is one that normally is not resolved by explicit provision in an agreement unless: (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice; or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties. [FN27]

FN26. REST.2D CONFL. OF LAWSS § 187(1) (1988).

FN27. *Id.* § 187(2)(a)-(b).

*7 For cases where a contract or agreement specifies the choice of Delaware law, Delaware's public policy is reflected in 6 *Del. C.* § 2708, which provides:

> (a) The parties to any contract, agreement or other undertaking, contingent or otherwise, may agree in writing that the contract, agreement or other undertaking shall be governed by or construed under the laws of this State, without regard to principles of conflicts of laws, or that the laws of this State shall govern, in whole or in part, any or all of their rights, remedies, liabilities, powers and duties if the parties, either as provided by law or in the manner specified in such writing are, (i) subject to the jurisdiction of the courts of, or arbitration in, Delaware and, (ii) may be served with legal process. *The foregoing shall conclusively be presumed to be a significant, material and reasonable relationship with this State and shall be enforced whether or not there are other relationships with this State.*
>
> (b) Any person may maintain an action in a court

of competent jurisdiction in this State where the action or proceeding arises out of or relates to any contract, agreement or other undertaking for which a choice of Delaware law has been made in whole or in part and which contains the provision permitted by subsection (a) of this section.

(c) This section shall not apply to any contract, agreement or other undertaking ... (ii) involving less than $100,000.[FN28]

FN28. 6 *Del. C.* § 2708 (emphasis added); *Abry Partners V, L.P. v. F & W Acquisition LLC,* 891 A.2d 1032, 1046-47 (Del. Ch.2006).

Delaware courts generally honor contractually-designated choice of law provisions so long as the jurisdiction selected bears some material relationship to the transaction.[FN29]

FN29. *See J.S. Alberici Const. Co. v. Mid-West Conveyor Co.,* 750 A.2d 518, 520 (Del.2000) (citing *Annan v. Wilm. Trust Co.,* 559 A.2d 1289, 1293 (Del.1989)).

Moreover, Delaware courts have held that a choice of law provision within a contract "should not be interpreted in a crabbed way that creates a commercially senseless bifurcation between pure contract claims and other claims that arise solely because of the nature of the relations between the parties created by the contract." [FN30] As this Court recently noted in *Abry Partners V:*

FN30. *Weil v. Morgan Stanley DW Inc.,* 877 A.2d 1024, 1032-33 (Del. Ch.2005), *aff'd,* 894 A.2d 407, (TABLE) (Del.2005).

When a rational businessperson enters into an agreement establishing a transaction or relationship and provides that disputes arising from the agreement shall be governed by the law of an identified jurisdiction, the logical conclusion is that he or she intended that law to apply to all disputes arising out of the transaction or relationship. We seriously doubt that any rational businessperson, attempting to provide by contract for an efficient and businesslike resolution of possible failure disputes, would intend that the laws of multiple jurisdictions would apply to a single controversy having its origin in a single, contract-based relationship. Nor do we believe such a person would reasonably desire a protracted litigation battle concerning only the threshold question of what law was to be applied to which asserted claims or issues. Indeed, the manifest purpose of a choice-of-law clause is precisely to avoid such a battle.[FN31]

FN31. *Abry Partners V, L.P.,* 891 A.2d at 1048 n. 25 (quoting *Nedlloyd Lines B.V. v. Superior Ct. of San Mateo County,* 834 P.2d 1148, 1154 (Cal.1992)).

***8** Here, the LATS is silent regarding choice of law; the Bridge Loan Agreement, in § 7.11, designates New York law; and the Merger Agreement, in § 13.5, designates Delaware law. In urging application of New York law, SIGA notes its principal place of business is in New York, the subject matter of the license, SIGA-246, is in New York, many of the negotiations as well as much of PharmAthene's part performance took place in New York, and the Bridge Loan Agreement specifies New York law. PharmAthene contends Delaware law should apply because the Merger Agreement states that Delaware law shall govern, and it was the last of the agreements executed by the parties. Further, the determination of whether § 12.3 of the Merger Agreement, in conjunction with the appended copy of the LATS, requires the parties to negotiate in good faith a license agreement in accordance with the terms of the LATS, or permits SIGA to insist on a license with materially different terms, lies at the heart of many of the counts of the Complaint.

Consistent with § 187 of the Restatement, the fact that the parties specified the state whose law will be applied in the Bridge Loan Agreement and the Merger Agreement convinces me that I should look to those agreements to determine the appropri-

ate choice of law, rather than the most significant relationship test. As to which of the two agreements should control the choice of law, I conclude the Merger Agreement takes precedence. The sequence of events is likely to be material to the resolution of the disputes presented in this action, and the Merger Agreement is the last of the agreements signed by the parties. In addition, the scope of that agreement in terms of the relationship between the parties is broader than the Bridge Loan Agreement. Based on those factors and the fact that the Merger Agreement bears importantly on the issues before this Court and is involved in each of at least counts one to five, I will analyze the issues presented by SIGA's motion to dismiss under Delaware law. [FN32]

> FN32. I also hold that Delaware law should govern the issues raised by PharmAthene's promissory estoppel and unjust enrichment claims, because those claims arise solely from the nature of the relations between the parties reflected in, among other things, the Merger Agreement. *See Weil,* 877 A.2d at 1032-33.

C. Counts One to Four

Counts one through four are premised on the existence of an agreement to enter into a license agreement consistent with the terms of the LATS. Specifically, in counts one through four, PharmAthene seeks specific performance, declaratory relief,[FN33] and breach of contract damages. PharmAthene primarily argues that the LATS, the Bridge Loan Agreement, the Merger Agreement, and PharmAthene's related conduct, taken together, reflect an enforceable agreement by SIGA to enter into a license agreement consistent with the terms of the LATS. SIGA responds that all four counts fail because no enforceable agreement exists binding it to enter into a license agreement conforming to the LATS. SIGA asserts the parties never intended to make such an agreement to agree, citing the "Non Binding Terms" language of the LATS. Additionally, SIGA argues that, in any event, the Court cannot specifically enforce such an agreement, because the LATS does not contain all of the material and essential terms to be incorporated into the final license agreement.

> FN33. Parties to a contract may seek a declaratory judgment to determine "any question of construction or validity" and may seek a declaration of "rights, status or other legal relations thereunder." 10 *Del. C.* § 6502. Declaratory relief is in the discretion of the Court and not available as a matter of right. 10 *Del. C.* § 6506. Here, PharmAthene seeks two declaration-that SIGA is obligated to execute the License Agreement PharmAthene proposed or such other license agreement in accordance with the terms of the LATS, the Bridge Loan Agreement, and the Merger Agreement as the Court decrees; and that SIGA is precluded from entering into a license agreement for SIGA-246 with any third party or otherwise exploiting the benefits of SIGA-246. Neither party discussed the second or preclusionary aspect of PharmAthene's request for declaratory relief. Accordingly, I do not consider it material to resolution of SIGA's motion.

***9** In evaluating SIGA's motion to dismiss as to counts one to four, I first address whether the allegations in the Complaint and reasonable inferences from them could support a conclusion that the parties intended to be bound to an agreement to enter into a license agreement consistent with the terms of the LATS. I conclude that by virtue of the cumulative effect of the LATS, the Bridge Loan Agreement, the Merger Agreement, and the parties' conduct, PharmAthene conceivably could prove the parties intended to be bound to such an agreement. Next, I address whether that agreement to agree could be legally enforceable, and determine that it could be. Lastly, I consider whether PharmAthene adequately has pled a claim for specific performance of the alleged agreement. Because PharmA-

thene conceivably could establish, by clear and convincing evidence, that the agreement to agree contains all the material and essential terms to be incorporated in the final contract, and overcome SIGA's other objections, I hold SIGA is not entitled to dismissal of PharmAthene's request for specific performance or any of counts one through four.

1. Intent to be bound

a. The LATS

On January 26, 2006, after discussing a possible collaboration in the development and commercialization of SIGA-246, PharmAthene and SIGA memorialized their agreement in the LATS. The LATS, a two page, unsigned document, addresses the parameters of the parties' contemplated partnership. The LATS, which broadly addresses a number of topics, expressly contains the phrase "Non Binding Terms" at the bottom of both pages.

After entering into the LATS, PharmAthene expended funds, transferred information, and provided management and technological know-how to SIGA. Indeed, for the first ten months of 2006, PharmAthene remained in constant contact with SIGA and played an active role in developing SIGA-246.

Neither the LATS alone nor the LATS together with PharmAthene's partial performance are likely to be sufficient to show the parties intended to be bound by the LATS as an agreement to agree. Not even PharmAthene contends the unsigned LATS alone, with the "Non Binding Terms" legend, creates an enforceable contract. PharmAthene does rely, however, on its alleged partial performance between January and October 2006 of its obligations relating to the joint development of SIGA-246 to support making the LATS enforceable. Considered in a vacuum, without regard to the other signed and unsigned documents the parties negotiated in the first half of 2006, the LATS and PharmAthene's part performance might not be sufficient to overcome the nonbinding legend on the LATS itself and demonstrate an intent to bind SIGA to negotiate a license agreement having terms consistent with those specified in the LATS.[FN34] The parties did negotiate several additional documents, however, and PharmAthene bases its claims on those documents, as well.

FN34. In assessing whether parties intended to bind themselves to a preliminary agreement, the language of the agreement is the "most important" consideration. *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 549 (2d Cir.1998). Because the LATS expressly states that it contains "Non Binding Terms," it is questionable whether PharmAthene's partial performance could override that language and demonstrate the existence of a binding agreement. In one case applying New York law, because the court could readily determine that a contract of a proposed sale was nonbinding from the agreement's plain language, the court concluded the agreement was nonbinding even though there had been "considerable partial performance." *Arcadian Phosphates, Inc. v.. Arcadian Corp.*, 884 F.2d 69, 73 (2d Cir.1989). Similarly, in another New York case, the court rejected an argument that the parties' substantial performance indicated an intent to be bound to a term sheet, when the term sheet expressly reserved the right of the parties not to be bound. *Kreiss v. McCown de Leeuw & Co.*, 37 F.Supp.2d 294, 300 (S.D.N.Y.1999). PharmAthene did not cite to any contrary Delaware law.

b. The Letter of Intent and the Merger Term Sheet

***10** On or about March 9, 2006, the parties signed a Letter of Intent regarding the proposed terms of a merger of PharmAthene into a subsidiary of SIGA. The Letter of Intent stated that it was an indication of the parties' intention to consummate a merger with terms "expected to be in accordance with" an attached Merger Term Sheet. The Letter of Intent further stated, "The parties agree to negotiate

in good faith, and to use their best efforts to (a) execute a definitive agreement with respect to the [Merger] as expeditiously as possible, on or before April 24, 2006, and (b) close the transaction as soon as is reasonably practicable." FN35

FN35. The Letter of Intent ¶ 1.

The Merger Term Sheet provides that upon any termination of it or a definitive merger agreement, the parties will negotiate in good faith the terms of a definitive license agreement in accordance with the terms set forth in the LATS, which was attached. The Merger Term Sheet also provides that PharmAthene or its shareholders will provide bridge financing in the form of a promissory note ("Bridge Loan") to SIGA of no less than $3 million. If the contemplated merger failed to close, the Merger Term Sheet specified certain details of SIGA's obligation to repay the Bridge Loan.

c. The Bridge Loan Agreement

As the development of SIGA-246 continued, SIGA required additional capital which PharmAthene agreed to provide. Therefore, consistent with the Letter of Intent, on March 20, 2006, the parties entered into the Bridge Loan Agreement. That Agreement obligated PharmAthene to loan SIGA $3 million for expenses related to the development of SIGA-246 and the Merger and corporate overhead. Although PharmAthene made the Bridge Loan in reliance on the parties' agreements for a continuing relationship regarding SIGA-246, the Bridge Loan Agreement explicitly recognized the possibility that ultimately they might not agree on either a merger or a license agreement. Specifically, the Bridge Loan Agreement provides in § 2.3 that:

> Upon any termination of the Merger Term Sheet ..., termination of the Definitive Agreement relating to the Merger, or if a Definitive Agreement is not executed ..., 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* FN36

FN36. The Bridge Loan Agreement § 2.3 (emphasis added).

Further, the Merger Term Sheet was attached to the Bridge Loan Agreement, and it stated that if no license agreement is executed, the Bridge Loan would be payable no more than two years from the date of the loan, and possibly sooner.

d. The Merger Agreement

On June 8, 2006, the parties executed an agreement and plan of merger, the Merger Agreement. The Merger Agreement is a 74 page document, signed by both parties. Broadly, the Merger Agreement addresses, among other topics: consideration for the merger, the merger's closing, representations and warranties of PharmAthene and SIGA, covenants, and conditions and obligations of PharmAthene and SIGA. Further, by its terms the Merger Agreement would terminate, if the parties did not close the merger by September 30, 2006.

***11** Similar to § 2.3 of the Bridge Loan Agreement, § 12.3 of the Merger Agreement provides, in relevant part:

> 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* FN37

FN37. The Merger Agreement § 12.3 (emphasis added).

Section 13.3 provides that each party shall use its "best efforts" to carry out and consummate the transactions contemplated by the Agreement.FN38 The meaning of the "in accordance with" language in § 12.3 of the Merger Agreement is critical to whether or not the parties intended to bind themselves to enter into a license agreement consistent with the terms of the LATS.

FN38. *Id.* § 13.3.

Under Delaware law, contract construction is a question of law.[FN39] In interpreting a contract, the court strives to determine the parties' shared intent, "looking first at the relevant document, read as a whole, in order to divine that intent." [FN40] As part of that review, the court interprets the words "using their common or ordinary meaning, unless the contract clearly shows that the parties' intent was otherwise." [FN41] If the contractual language is "clear and unambiguous," the ordinary meaning of the language will generally establish the parties' intent . [FN42] A contract is ambiguous, however, when the language "in controversy [is] reasonably or fairly susceptible of different interpretations or may have two or more different meanings." [FN43] Stated differently, to succeed on its motion, SIGA must establish that its construction of the Merger Agreement is the only reasonable interpretation.

FN39. *See Rhone-Poulenc Basic Chems. Co. v. Amer. Motorists Ins. Co.,* 616 A.2d 1192, 1195 (Del.1992).

FN40. *Matulich v. Aegis Comm'ns Group, Inc.,* 2007 WL 1662667, at *4 (Del. Ch. May 31, 2007) (citing *Kaiser Aluminum Corp. v. Matheson,* 681 A.2d 392, 395 (Del.1996)); *Brandywine River Prop., Inc. v. Maffet,* 2007 WL 4327780, at *3 (Del. Ch. Dec. 5, 2007).

FN41. *Cove on Herring Creek Homeowners' Assoc. v. Riggs,* 2005 WL 1252399, at * 1 (Del. Ch. May 19, 2005) (quoting *Paxson Commc'ns Corp. v. NBC Universal, Inc.,* 2005 WL 1038997, at *9 (Del. Ch. Apr. 29, 2005)).

FN42. *Brandywine River,* 2007 WL 4327780, at *3.

FN43. *Rhone-Poulenc,* 616 A.2d at 1196. Ambiguity does not exist simply because the parties do not agree on a contract's proper construction. *United Rentals, Inc. v. Ram Holdings, Inc.,* 2007 WL 4496338, at *15 (Del. Ch. Dec. 21, 2007).

Both parties acknowledge that, when interpreting a contract, Delaware courts try to avoid an interpretation that would render a provision illusory or meaningless.[FN44] SIGA argues the obligation to negotiate in good faith "in accordance with" the terms set forth in the LATS does not constitute an obligation to actually enter into an agreement, but only to engage in good faith negotiations. Further, SIGA contends the phrase "Non Binding" in the LATS meant that it was free to negotiate terms addressed in the LATS, such as economic amounts, in its best interest, even if that meant seeking terms materially different from the LATS. SIGA also notes that the parties could have removed the phrase "Non Binding" when they attached the LATS to the Merger Agreement, but did not.[FN45]

FN44. *See 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).

FN45. Additionally, SIGA unpersuasively argues that PharmAthene's position that the LATS is definite, certain, and sufficient would render § 12.3 meaningless. It is not uncommon for parties to agree on the major terms of a license agreement with the understanding that a definitive agreement including many other relatively standard terms will be necessary. The Complaint and supporting documents support a reasonable inference that that is what occurred here, although the evidence ultimately may show otherwise.

PharmAthene argues the "Non Binding" legend in the LATS meant the parties could not simply sign the LATS because, while it contained all of the material terms, the parties recognized they needed additional provisions and language to have a definitive license agreement. PharmAthene further asserts that, consistent with § 12.3 of the Merger

Agreement, any additional terms had to be consistent or "in accordance with" the terms of the LATS. Therefore, PharmAthene contends its reading of the LATS and the Merger Agreement does not render the language illusory or meaningless, while SIGA's reading does.

***12** I find the "in accordance with the terms set forth in the [LATS]" language in the Bridge Loan Agreement and the Merger Agreement fairly susceptible to at least two reasonable interpretations and therefore ambiguous. The record relevant to SIGA's motion to dismiss indicates the parties originally created the LATS in January 2006 as a stand alone document. There was no accompanying letter of intent or similar document to provide context for the LATS. In these circumstances, it is reasonable to infer the parties intended the "Non Binding Terms" legend on each page to make clear they had not yet reached agreement on a license agreement .[FN46] The situation is significantly less clear as to the meaning of the provisions of the Bridge Loan Agreement, executed in late March 2006, and the Merger Agreement, executed in June 2006, referencing the terms of the LATS. SIGA's argument that, notwithstanding those documents, it remained free to negotiate terms of a definitive license agreement in its best interests whether or not they comported with the LATS conceivably would render the "in accordance with" language of the two agreements illusory. On the other hand, the Court cannot rule out SIGA's construction as unreasonable, because it draws at least some support from the legend on the LATS indicating that its terms are nonbinding.

> FN46. In contrast the parties actually signed a Letter of Intent in connection with the Merger Term Sheet in March 2006. The Letter of Intent stated that it was an indication of the parties' intention to consummate a merger with terms "expected to be in accordance with" an attached Merger Term Sheet. This language effectively conveys the nonhinding nature of the Merger Term Sheet.

PharmAthene's proffered interpretation of the "in accordance with" language, though, is also reasonable. The Bridge Loan Agreement refers to a "proposed license agreement" and states that SIGA and PharmAthene will "negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the [LATS]." The "in accordance with" language conceivably could reflect the parties' intention to bind themselves to negotiate in good faith with the intention of executing a license agreement consistent with the terms of the LATS, notwithstanding the "Non Binding Terms" legend.

The same reasoning applies with greater force to the nearly identical language relating to the LATS in the Merger Agreement executed on June 8, 2006. The Merger Agreement is a complicated and extensive agreement of the parties regarding a possible mechanism for their continuing collaboration on SIGA-246, among other things. By the time the parties entered into that agreement, PharmAthene allegedly had provided significant partial performance of its perceived obligations. In these circumstances and giving the phrase "in accordance with the terms set forth in the [LATS]" its ordinary meaning, I find PharmAthene conceivably could adduce facts that support the allegations in its Complaint that the parties intended to bind themselves to enter into a license agreement consistent with the LATS.[FN47] At this early stage in the litigation, the record does not disclose whether the parties ever discussed the apparent inconsistency between the "in accordance with" language in the Merger Agreement and the "Non Binding Terms" legend on the LATS. In sum, because SIGA has not shown its interpretation of the disputed provisions, particularly the "in accordance with" language, is the only reasonable one, I find the provisions ambiguous. Contract ambiguities generally are not amenable to resolution on a motion to dismiss.[FN48]

> FN47. In its briefing, SIGA argued that merely conforming to the general

"framework" specified in the LATS in terms of, for example, a collaboration on SIGA-246 that encompassed upfront and milestone payments, royalties, a joint research and development committee, a worldwide territory, and other items within the framework set forth in the LATS, would satisfy the "in accordance with" requirement, even if the substantive terms in those areas materially differed from the LATS. Assuming arguendo such an interpretation might apply, I find PharmAthene's construction requiring conformity to the substance of the terms of the LATS represents a reasonable alternative interpretation.

FN48. *See Vanderbilt Income & Growth Assocs. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del.1996).

2. Is the agreement to agree legally enforceable?

***13** Having concluded PharmAthene conceivably could establish that the parties intended to be bound to an agreement to enter into a license agreement consistent with the substantive terms of the LATS, I next address whether that agreement to agree could be legally enforceable.

Under Delaware law, parties may make agreements to make a contract and such an agreement "will be enforced if the agreement specifies all of the material and essential terms including those to be incorporated in the future contract." [FN49] In evaluating SIGA's motion to dismiss counts one to four, it is reasonably conceivable that PharmAthene could prove, based on the facts alleged in the Complaint, the LATS contains all material and essential terms of the contemplated license agreement.

FN49. *Vale v. Atl. Coast & Inland Corp.*, 99 A.2d 396, 399 (Del. Ch.1953). The cases cited by the parties for this proposition discussed it in the context of a claim for specific performance as a remedy. PharmAthene's count one seeks specific performance and is addressed further in Part II.C.3, *infra*. Counts two through four of the Complaint seek other forms of relief, but also assert the existence of a legally binding contract to enter into a license agreement that includes the substantive terms of the LATS. In my opinion, to succeed on such a claim, as opposed to a claim based solely on contractual duties to negotiate a license agreement in good faith, as asserted in count five (discussed in Part II.D, *infra*), PharmAthene still would have to prove the LATS specified all the material and essential terms of the license agreement.

As previously noted, the LATS is a two page document addressing the parameters of the parties' planned partnership. It describes the parties' objective as: "To establish a partnership to further develop & commercialize SIGA-246 for the treatment of Smallpox and orthopox related infections and to develop other orthopox virus therapeutics." Further, the LATS specifies a collaboration encompassing a worldwide territory in the fields of "[a]ll therapeutic and prophylactic uses of Products," defined as including: SIGA-246; any orthopox related small molecule therapeutic product derived from the same family of Iricyclononenes that SIGA-246 was derived from; anti-orthopoxvirus compounds discovered in the original screen which are mechanically identical but chemically distinct; and any compounds covered by patents whose claims include SIGA-246.

According to the LATS's "Licenses" section, "SIGA shall grant a worldwide exclusive license" under the Patents, Know-How, and Materials, as defined, to "use, develop, make, have made, sell, export and import Products in Field. The right to grant sublicenses shall be specifically included in the license." The LATS also provides for a $6 million License Fee, of which $2 million would be due upfront and the remainder in deferred payments according to a schedule outlined in the LATS.

In addition, the LATS sets forth Milestone and Royalty terms. Regarding Milestones, the LATS provides that as the Product development progressed various cash milestones would become due. For example, approval of a new drug application or NDA would trigger a $2 million cash milestone; the first United States Government contract sale exceeding $50 million another of $3 million; and sales in excess of $200 million another of $2 million. Regarding Royalties, PharmAthene would pay SIGA incremental royalties for corresponding portions of yearly net sales of Patented Products at a rate of 8% for sales less than or equal to $250 million, 10% of sales greater than $250 million, and 12% of sales exceeding $1 billion.

SIGA argues the LATS does not contain all the material terms of a sophisticated biotechnology license agreement. According to SIGA, even the terms that were included were far from certain in that they were expressly "Non Binding." SIGA also avers the parties' conduct and course of dealing in executing letters of intent and term sheets before entering into the Merger and Bridge Loan Agreements demonstrate their understanding that sophisticated multi-million dollar license agreements of this scope and complexity would require a written, formal, comprehensive, definitive agreement.

***14** PharmAthene responds that there is a binding license agreement between the parties because all of the material and essential terms were agreed upon with certainty, as reflected in the LATS. It also points to the parties' subsequent conduct as illustrating the lack of any open material terms.

SIGA's argument is too conclusory to be convincing. SIGA did not cite any legal authority for its contention the LATS lacks certain material or essential terms of a license agreement. Hence, the issue is primarily one of fact. At this early stage in the proceeding, however, the facts remain to be developed. Moreover, SIGA has failed to cite anything in the Complaint and its related documents that would enable me to conclude PharmAthene could not conceivably show from the facts alleged that the LATS addresses all the material and essential terms of the license agreement.

As appears from the previous recitation of various terms prescribed in the LATS, the document does address a number of terms that would be material and essential to a license agreement of the kind contemplated here. Those terms include the technology involved, the geographic scope of the license, the nature of the license rights to be granted, such as the right to grant sublicenses, the products covered, and the royalties to be paid. It certainly is open to question whether the terms mentioned in the LATS constitute *all* of the material and essential terms of the license, but resolution of that issue must await further development of the record.

The parties' conduct, as alleged in the Complaint, further supports this conclusion. Beginning in late 2005, SIGA and PharmAthene discussed and negotiated a framework agreement for their collaboration, through oral and written communications and the exchange of drafts of a term sheet. In January 2006, SIGA and PharmAthene reached agreement on a basis for the development and marketing of SIGA-246 and memorialized their understanding in the LATS.

Extensive discussions and planning about development followed. PharmAthene began expending funds, transferring information to SIGA, and providing management, marketing, and technical know-how. SIGA's and PharmAthene's business, technical, and scientific personnel were in constant contact.

When these discussions occurred, SIGA needed capital for the development of SIGA-246. Thus, as part of the Merger Term Sheet, SIGA sought, and PharmAthene agreed to provide, bridge financing. On March 20, 2006, PharmAthene entered into the Bridge Loan Agreement and later lent SIGA $3 million. On June 8, 2006, the parties executed the Merger Agreement.

From January 2006 to October 2006, PharmA-

thene provided capital, management, and technical know-how in reliance on the LATS, which SIGA accepted and used to develop SIGA-246. Among other things PharmAthene pushed for, modified, and funded clinical trials of SIGA-246, prepared for and made presentations to government agencies with SIGA, recommended avenues for advancing the development of SIGA-246, evaluated and recommended manufacturers, and assisted on quality control and quality assurance. Taken together, PharmAthene's actions are sufficient to support a reasonable inference that it, at least, believed the LATS covered all the material and essential terms of the license agreement.

***15** Finally, nothing in the allegations in the Complaint or the documents incorporated in it indicates the LATS did not address all the material terms. The parties' negotiations regarding a definitive license agreement in October and November 2006 appear to have failed because SIGA insisted on substantive terms that differed drastically from the terms set forth in the LATS. SIGA has not cited any instance where the parties reached an impasse about a term not dealt with in the LATS.

In sum, I cannot rule out the possibility that PharmAthene could show the LATS contains all of the material and essential terms to be incorporated into the definitive license agreement. Thus, I will not dismiss counts one to four for lack of an enforceable agreement.

3. Is the agreement to agree specifically enforceable?

Next, I consider whether PharmAthene adequately has pled its claim in count one for specific enforcement of the alleged license agreement. Under Delaware law, "a contract to make a contract may be specifically enforced if it contains all of the material and essential terms to be incorporated into the final contract, and if those terms are definite and certain." [FN50] Further, a party seeking specific performance has the burden of proving the existence of an enforceable contract by clear and convincing evidence.[FN51] The decision as to the availability of specific performance rests within the sound discretion of this Court.[FN52]

FN50. *Hazen v. Miller,* 1991 WL 244240, at *5 (Del. Ch. Nov. 18, 1991) (citing *Vale,* 99 A.2d at 399); *M.F. v. F.,* 172 A.2d 274, 276 (Del. Ch.1961).

FN51. *See Williams v. White Oak Builders, Inc.,* 2006 WL 1668348, at *4 (Del. Ch. June 6, 2006) (quoting Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate & Commercial Practice in the Delaware Court of Chancery,* § 12-3, at 12-35 (2000)).

FN52. *See Gildor v. Optical Solutions, Inc.,* 2006 WL 1596678, at *10 (Del. Ch. June 5, 2006).

As discussed in Part II.C.2, *supra,* based on the allegations in the Complaint and the associated documents, it is reasonably conceivable that PharmAthene could show the LATS contains all of the material and essential terms to be incorporated into the final license agreement. For essentially the same reasons, I consider it conceivable that PharmAthene also could establish that proposition by clear and convincing evidence and show that the terms of the LATS are sufficiently definite and certain to support a claim for specific performance. Thus, I cannot dismiss count one on any of those grounds.

SIGA makes additional arguments, however, against specific performance-*i.e.,* that it would be impractical and inequitable and that money damages would be an adequate remedy. Regarding the impractical and inequitable argument, SIGA asserts that ordering the parties to form a joint Research and Development Committee to work together to research and develop SIGA-246, as contemplated by the LATS, is akin to involuntary servitude. Further, SIGA contends such an order may create a contentious and unproductive work environment, to the detriment of the parties and the public at large, since SIGA-246 potentially would protect against

biological warfare. In making its argument, SIGA relies on a case in which the court declined to order members of a band to play together involuntarily under the guise of specific performance.[FN53] Yet, the facts of this case are readily distinguishable in that PharmAthene's Complaint involves allegations of material partial performance and a sophisticated biotechnology license agreement between two corporations. At this early stage, I am dubious about PharmAthene's claim for specific performance, but am not prepared to reject it as either impractical or inequitable.

FN53. *See Read v. Wilmington Senior Ctr., Inc.*, 1992 WL 296870, at *1 (Del. Ch. Sept. 16, 1992).

***16** As to the adequacy of money damages, SIGA argues damages would be sufficient because there is nothing unique about the subject matter of the alleged license agreement. Again, based on the record before me, PharmAthene conceivably could succeed in establishing that the subject matter of the alleged contract is unique. Accordingly, I reject SIGA's additional arguments for dismissal of count one.

D. Count Five

In count five, PharmAthene seeks damages for breach by SIGA of its express duties under the Bridge Loan Agreement and the Merger Agreement to negotiate in good faith a definitive license agreement in accordance with the terms set forth in the LATS and under the Merger Agreement to use its best efforts to carry out and consummate the transactions contemplated by that Agreement.

In moving to dismiss count five, SIGA argues PharmAthene does not allege that SIGA refused to meet or discuss potential collaboration regarding SIGA-246, prematurely cut-off discussions, or negotiated with another party. Rather, PharmAthene acknowledges the negotiations that ensued between the parties after the Merger Agreement expired.[FN54] SIGA further argues that it satisfied its obligations to negotiate terms in accordance with the LATS by proposing terms consistent with the "general framework" set forth in the LATS. According to SIGA, however, the specific terms of the LATS were "Non Binding," thus permitting it to negotiate in its best interest, for example, the particular economic amounts.[FN55]

FN54. SIGA contends it did negotiate in good faith, chronicling the parties' negotiations, as alleged in the Complaint: PharmAthene presented SIGA with a draft license agreement; SIGA reviewed and discussed the draft agreement; at SIGA's suggestion, the parties met face-to-face to discuss a potential collaboration on November 6, 2006; SIGA suggested a "formal partnership" between the two companies; SIGA agreed, at PharmAthene's request, to provide a written collaboration proposal; less than three weeks later, SIGA provided PharmAthene with a 102-page draft Limited Liability Company Agreement detailing a potential collaboration; PharmAthene rejected the draft agreement; and SIGA informed PharmAthene that it was willing to meet again to discuss a potential collaboration.

FN55. Additionally, SIGA discounts the "best efforts" clause in the Merger Agreement as a generic provision in the "Miscellaneous" section stating that each party will use its "best efforts to take such actions as may be necessary or reasonably requested by the other parties hereto to carry out and consummate the transactions contemplated by this Agreement." According to SIGA, when applied to § 12.3, the best efforts clause merely requires SIGA to use its best efforts for the prescribed 90 days to negotiate in good faith exclusively with PharmAthene a definitive license agreement.

PharmAthene argues that, by negotiating for different economic terms than were in the LATS,

SIGA breached § 12.3 of the Merger Agreement and § 2.3 of the Bridge Loan Agreement. For the reasons previously stated, I consider the phrase "in accordance with" in those contract provisions ambiguous and believe PharmAthene conceivably could show § 12.3, for example, committed the parties to the terms they agreed upon in the LATS and to negotiate in good faith other terms consistent with the LATS. Based on that conclusion and the allegations in the Complaint that SIGA insisted materially different terms, PharmAthene conceivably could succeed in proving SIGA breached its obligations under the Bridge Loan and Merger Agreements to negotiate in good faith and use its best efforts to conclude a license agreement with PharmAthene in accordance with the terms set forth in the LATS. Thus, I deny SIGA's motion to dismiss count five for breach of express covenants for failure to state a claim.

E. Promissory Estoppel

In counts six and seven, PharmAthene assumes an ultimate failure to prove an enforceable contract and seeks relief under alternative theories of promissory estoppel and unjust enrichment. In count six, PharmAthene requests recovery under promissory estoppel on grounds that it was damaged when it provided SIGA with management expertise, technical know-how, and capital in reliance on SIGA's promise that it wanted and intended to enter into an ongoing relationship with PharmAthene as to SIGA-246 upon the terms set forth in the LATS.

***17** According to SIGA, PharmAthene failed to allege a clear and unambiguous promise to enter into a license agreement on the terms set forth in the LATS. SIGA argues that in the absence of such a promise, any reliance by PharmAthene was unreasonable and unforeseeable, and any supposed injury well short of an actionable injustice. SIGA further contends that the LATS cannot constitute a promise upon which PharmAthene could reasonably rely given that each page plainly states "Non Binding Terms." Similarly, SIGA argues that neither the Bridge Loan Agreement nor the Merger Agreement provides the requisite clear and unambiguous promise, because both agreements require only that the parties negotiate toward a license agreement, indicating there was no such agreement in place.

Under Delaware law, to establish a claim for promissory estoppel, a plaintiff must show by clear and convincing evidence that: (1) a promise was made; (2) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (3) the promisee reasonably relied on the promise and took action to his detriment; and (4) such promise is binding because injustice can be avoided only by enforcement of the promise.[FN56]

> FN56. *See RGC Int'l Investors, LDC v. Greka Energy Corp.*, 2001 WL 984689, at *14 (Del. Ch. Aug. 22, 2001); *Lord v. Souder*, 748 A.2d 393, 399 (Del.2000).

SIGA seeks dismissal of count six on the grounds that the documents on which PharmAthene relies in its Complaint show SIGA never unequivocally promised to enter into a collaboration with PharmAthene on the terms set forth in the LATS and that any alleged reliance by PharmAthene was unreasonable. The Complaint alleges that once PharmAthene and SIGA reached agreement on the LATS, PharmAthene began expending funds, transferring information to SIGA, and providing management, marketing, and technical know-how. On March 20, 2006, PharmAthene entered into the Bridge Loan Agreement. PharmAthene asserts it made this loan in reliance on SIGA's obligation under § 2.3 of the Bridge Loan Agreement to negotiate in good faith a definitive license agreement in accordance with the LATS. Similarly, after execution of the Merger Agreement, PharmAthene continued to provide SIGA advice and assistance for the development of SIGA-246 in reliance on SIGA's representation in § 12 .3, that upon termination of the merger the parties would negotiate in good faith a definitive license agreement "in accordance with the terms set forth in the [LATS]." In this context, PharmAthene alleges in its promissory

estoppel claim that:

> Siga clearly and unequivocally promised PharmAthene, orally and in writing, and throughout the parties' dealings, that it wanted and intended to enter into an ongoing relationship with PharmAthene with respect to SIGA-246 upon the terms set forth in the [LATS], and that if PharmAthene was prepared to take the risks of the uncertainties of SIGA-246, it would share in the rewards. [FN57]

FN57. Compl. ¶ 86.

Based on the record before me, and drawing all inferences in PharmAthene's favor, as I must, I find that PharmAthene could show the existence of a promise by SIGA as alleged and reasonable reliance thereon by PharmAthene.[FN58] Determining whether the other elements for promissory estoppel are met will require a fact intensive inquiry into the details of the parties' dealings. Those issues cannot be resolved on a motion to dismiss.[FN59] Thus, SIGA's motion to dismiss PharmAthene's promissory estoppel claim is denied.

FN58. *See RGC Int'l,* 2001 WL 984689, at *14 (finding where a party reasonably relied to its detriment on promises contained in a term sheet, the elements of promissory estoppel were met). SIGA attempts to distinguish *RGC International* on the grounds that the term sheet at issue did not include language that the parties expressly reserved the right not to be bound. Def.'s Reply Br. ("DRB") at 21. If PharmAthene's claims relied solely on the LATS, SIGA's argument might be persuasive. In fact, PharmAthene also relies on the Bridge Loan Agreement, the Merger Agreement, and various other documents. These documents render untenable SIGA's attempt to distinguish *RGC International* based on the "Non Binding" language of the LATS.

FN59. *See Arcadian Phosphates, Inc. v. Arcadian Corp.,* 884 F.2d 69, 74 (2d Cir.1989).

F. Unjust Enrichment

***18** In count seven, PharmAthene seeks damages constituting the value of the benefits it bestowed on SIGA to prevent unjust enrichment. The Complaint alleges PharmAthene contributed management expertise, technical know-how, and capital, at SIGA's request and with SIGA's express or implied consent, and that SIGA knowingly solicited, accepted, and used those contributions to its economic benefit, without any compensation to PharmAthene.

SIGA argues that PharmAthene's unjust enrichment claim should be dismissed on two grounds-there was a justification for providing the supposed enrichment and there was no injustice in allowing SIGA to retain the supposed enrichment. Citing New York law, SIGA asserts that courts reject unjust enrichment claims where there was a self-interested justification for expenditures, noting that unjust enrichment is not an appropriate remedy for recovery of the expenses of failed negotiations. [FN60] SIGA contends PharmAthene wanted SIGA-246 to succeed so that if and when it either merged or executed a licensing agreement with SIGA, the drug would be in its most optimal stage for commercialization and implementation. SIGA argues that although the parties' negotiations did not materialize as PharmAthene anticipated, PharmAthene had its own business justification for voluntarily giving assistance to SIGA over the course of the negotiations. Therefore, according to SIGA, PharmAthene had a justification for providing the enrichment, and the fact that no license agreement was ever executed does not transform PharmAthene's self-interested efforts into an actionable injustice.

FN60. *See Songbird Jet Ltd. v. Amax Inc.,* 581 F.Supp. 912, 926-27 (S.D.N.Y.1984); *Beekman Inv. Partners, L.P. v. Alene Candles, Inc.,* 2006 WL 330323, at *8-9 (S.D.N.Y. Feb. 14, 2006).

Additionally, SIGA relies on *Palese v. Delaware State Lottery Office,* [FN61] in which the court dismissed an unjust enrichment claim where there was no injustice in allowing the defendant to retain the supposed enrichment. In particular, the defendant in *Palese* acted within the bounds of their prescribed legal authority and in conformity with the governing statute and regulations, and thus with justification. According to SIGA, it also was fully justified in accepting and retaining assistance because it was acting within its legal rights in refusing to execute a license agreement containing terms that were expressly stated to be "Non Binding."

FN61. 2006 WL 1875915, at *5 (Del. Ch. June 29, 2006).

PharmAthene defends the adequacy of its unjust enrichment claim. The Complaint alleges that PharmAthene provided funds, information, advice, and management to SIGA for the development of SIGA-246; that as a result SIGA-246 achieved significant success thresholds and SIGA obtained third party financing; and that SIGA received all of the benefits of PharmAthene's assistance while PharmAthene received nothing. Therefore, PharmAthene contends that if the Court finds it does not have a remedy at law, the Complaint states a viable claim for unjust enrichment.

The parties agree the elements of unjust enrichment are: (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and the impoverishment; (4) the absence of a justification; and (5) the absence of a remedy at law.[FN62]

FN62. *See Jackson Nat'l Life Ins. Co. v. Kennedy,* 741 A.2d 377, 393 (Del. Ch.1999); Pl.'s Ans. Br. at 31; DRB at 22.

***19** Here, the parties primarily dispute the fourth element, the absence of a justification. For many of the reasons previously discussed in connection with PharmAthene's other claims, I find that PharmAthene conceivably could show the absence of a justification for its impoverishment and the correlative enrichment of SIGA. Thus, I deny SIGA's motion to dismiss PharmAthene's unjust enrichment claim.

The cases SIGA cited in support of its motion are either inapposite or not persuasive. For example, in contrast to the situation in the *Palese* case, I cannot say with confidence at this early stage of the litigation that SIGA acted within the bounds of its rights and responsibilities in retaining the benefits of PharmAthene's contributions, while insisting on terms for a license agreement drastically less favorable to PharmAthene than the terms in the LATS. Ultimately, SIGA may succeed in proving its position, but that will require the Court to resolve a number of factual issues suggested by the Complaint. This case also differs from those cited by SIGA for the proposition that a person disappointed in the outcome of a failed contract negotiation is not entitled to recover costs it may have incurred in pursuing such negotiations.[FN63] The Complaint alleges PharmAthene contributed funds, information, advice, and management assistance that significantly furthered the success of SIGA-246. These contributions, which occurred in the context of an alleged collaboration between PharmAthene and SIGA, differ in kind from the expenses of failed negotiations and conceivably could support a claim for unjust enrichment. The facts of the *Songbird Jet Ltd. v.. Amax, Inc.* case [FN64] SIGA relies on may be more analogous to this dispute. There, however, the court evaluated the plaintiff's unjust enrichment claim on summary judgment with the benefit of an appropriately developed factual record. This case has not reached that stage.

FN63. *See Beekman,* 2006 WL 330323, at *8-9.

FN64. 581 F.Supp. 912 (S.D.N.Y.1984).

III. CONCLUSION

For the reasons stated, SIGA's motion to dismiss PharmAthene's Complaint is denied in all respects. The stay of discovery ordered on March 8,

2007 is hereby vacated.

IT IS SO ORDERED.

Del.Ch.,2008.
Pharmathene, Inc. v. Siga Technologies, Inc.
Not Reported in A.2d, 2008 WL 151855 (Del.Ch.)

END OF DOCUMENT

EXHIBIT B

Not Reported in A.3d, 2010 WL 4813553 (Del.Ch.)
(Cite as: 2010 WL 4813553 (Del.Ch.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.
PHARMATHENE, INC., a Delaware corporation, Plaintiff,
v.
SIGA TECHNOLOGIES, INC., a Delaware corporation, Defendant.

Civil Action No. 2627--VCP.
Submitted: July 22, 2010.
Decided: Nov. 23, 2010.

A. Richard Winchester, Esquire, Christopher A. Selzer, Esquire, McCarter & English, LLP, Wilmington, Delaware; Roger R. Crane, Esquire, K & L Gates LLP, New York, New York, Attorneys for Plaintiff.

Andre G. Bouchard, Esquire, Sean M. Brennecke, Esquire, Bouchard Margules & Friedlander, P.A., Wilmington, Delaware; Harold P. Weinberger, Esquire, Jennifer L. Rochon, Esquire, Seth F. Schinfeld, Esquire, Kramer Levin Naftalis & Frankel LLP, New York, New York, Attorneys for Defendant.

MEMORANDUM OPINION

PARSONS, Vice Chancellor.

***1** This is the next stage in a long-running breach of contract case between PharmAthene, Inc. ("PharmAthene") and SIGA Technologies, Inc. ("SIGA"). The dispute between the parties arose over a licensing agreement term sheet (the "LATS") that they negotiated before entering into merger talks. The parties entered into a merger agreement term sheet to which they attached the LATS and stipulated that, if negotiations for a definitive merger agreement broke down, the parties would negotiate a licensing agreement in good faith in accordance with the terms of the LATS. Later, when the parties failed to finalize the merger agreement, they entered into negotiations for a licensing agreement. SIGA took the position that the LATS was not binding and merely constituted an agreement to agree. Accordingly, SIGA attempted to obtain much more favorable economic terms because SIGA's drug, the subject of the LATS, had passed some important milestones after the parties negotiated the LATS. By contrast, PharmAthene claimed that the LATS was binding and, while it was willing to make some moderate adjustments, argued that the framework of any licensing agreement and its principal terms had to be substantially similar to the LATS. Talks subsequently broke down and PharmAthene sued, alleging, among other things, that SIGA had breached its obligations under the LATS. SIGA has moved for a partial summary judgment declaring that the parties never entered into a binding licensing agreement and that PharmAthene cannot pursue the remedy of expectation damages because it would be too speculative.

For the reasons stated in this Memorandum Opinion, I conclude that PharmAthene has demonstrated that there is a material issue of fact as to whether the parties entered into a binding licensing agreement. PharmAthene also has shown that it is plausible that upon a more complete record it may be able to demonstrate by clear and convincing evidence that the parties had agreed on all essential terms and, therefore, PharmAthene may be entitled to specific enforcement of the alleged licensing agreement. I further conclude that, although it is unlikely that PharmAthene will be able to prove its claim for expectation damages or to overcome the objections that such damages are simply too speculative in the context of this action, it would be premature to grant summary judgment on that issue. Rather, it should be considered in the context of all

of the issues and a full record after trial. Therefore, I deny SIGA's motion for partial summary judgment in all respects.

I. BACKGROUND

A. The Parties

Plaintiff, PharmAthene, a Delaware corporation, has its principal place of business in Annapolis, Maryland, is a biodefense company engaged in the development and commercialization of medical countermeasures against biological and chemical weapons.

Defendant, SIGA, also a Delaware corporation, has its principal place of business in New York, New York. SIGA is a biodefense company concentrating on the discovery and development of oral antiviral and antibacterial drugs to treat, prevent, and complement vaccines for high-threat biowarfare agents.

B. Facts

***2** In 2004, SIGA acquired the technology for a product now known as ST–246, [FN1] an orally administered antiviral drug for the treatment of smallpox.[FN2] At that time, the viability of ST–246, its potential uses, safety, and efficacy, and the possibility of its obtaining government approvals and being the subject of government supply contracts were all unknown. There was a possibility that, with cash, marketing, and technical knowledge, ST–246 might become an important weapon against smallpox and, therefore, extremely valuable. There was also the possibility that any money or effort invested in ST–246 would be for naught.

FN1. ST–246 is alternately referred to as "SIGA–246" and "246."

FN2. For the most part, unless otherwise indicated, the facts recited in this Memorandum Opinion are undisputed and, therefore, are not accompanied by citations to the evidentiary record. Where there is any doubt, appropriate citations are provided. For more background, see the January 16, 2008 Memorandum Opinion in which I denied SIGA's motion to dismiss, *Pharmathene, Inc. v. Siga Techs., Inc.*, 2008 WL 151855 (Del. Ch. Jan. 16, 2008).

By late 2005, SIGA experienced some difficulties developing ST–246 and bringing it to market. Around this time, SIGA and PharmAthene discussed a possible collaboration.[FN3] Through an exchange of oral and written communications, SIGA and PharmAthene negotiated a framework agreement for their collaboration regarding the development and commercialization of ST–246.

FN3. Earlier, in or about December 2003, SIGA also held discussions with PharmAthene concerning a potential collaboration. SIGA had never developed or commercialized a drug, while PharmAthene and its executives had developed and launched over twenty five pharmaceutical products.

1. The License Agreement Term Sheet

On January 17, 2006, while SIGA and PharmAthene were engaged in negotiations for a licensing agreement, Donald Drapkin, Chairman of SIGA's Board of Directors, called Eric Richman, a Vice President of business development and strategic planning at PharmAthene. In their conversation, Drapkin told Richman that the terms of PharmAthene's proposal for the licensing agreement term sheet were very close but that two changes were necessary "and if those changes are okay with [PharmAthene's] side, we have a final term sheet." [FN4] The two changes were made and Richman concluded that a deal had been reached: "My understanding is that at that point we were finished. Assuming we were okay with the two changes and our Board approved it, we had a deal. The terms were not going to change, those terms were the terms and that was—that was our deal." [FN5]

FN4. Pl.'s Opp'n Mem. ("POM") App. Vol. 10 Ex. 126, Dep. of Eric Richman ("Richman Dep.") 64–65. Similarly, De-

fendant's opening and reply memoranda are referred to as "DOM" and "DRM," respectively.

FN5. *Id.* at 69.

On January 26, 2006, the parties memorialized their agreement to collaborate in a two page document entitled "SiGA/PharmAthene Partnership," referred to in the Complaint as the "License Agreement Term Sheet" or LATS.[FN6] The LATS describes the parties' objective as: "To establish a partnership to further develop & commercialize SIGA–246 for the treatment of Smallpox and orthopox related infections and to develop other orthopox virus therapeutics." [FN7] The LATS also sets forth terms relating to, among other things, patents covered, licenses, license fees, and royalties. The LATS is not signed and contains a legend in the footer of each page that states "Non Binding Terms."

FN6. The LATS is in the form of a table that includes the following headings: objective, fields, products, territory, patents, know-how, materials, licenses, R & D committee, license fee, deferred license fee, milestones, and royalties. Aff. of Sean M. Brennecke in Supp. of Mot. for Summ. J. ("Brennecke Aff.") Ex. F, the LATS.

FN7. LATS at 1.

2. Letter of Intent and Annexed Merger Term Sheet

As the parties' collaboration continued, SIGA suggested to PharmAthene that the companies consider a merger. Before beginning merger talks, however, the PharmAthene Board of Directors wanted to be sure that PharmAthene "ended up with the product either through the license or through the merger." [FN8] According to PharmAthene, the discussions progressed as follows. In a negotiating session on February 22, 2006 at Drapkin's office, PharmAthene's representatives pushed for a definitive licensing agreement. Drapkin, however, objected to spending money on "a bunch of lawyers to sit around to work on a License Agreement that will never be used." [FN9] Rather, "what he suggested was to attach the Term Sheet [*i.e.,* the LATS] to the License Agreement [*i.e.* the Merger Term Sheet], and he dictated language to our attorney that would be as he said, just as good." [FN10] PharmAthene pushed back, seeking a definitive agreement, but Drapkin insisted nothing more was needed: " 'We discussed the fact that we had to have a Term Sheet—excuse me, we had to have a license to 246 or a merger. And Donald [Drapkin] at this meeting guaranteed that we had an agreement.' " [FN11] Furthermore, at a March 3, 2006 meeting, again at Drapkin's office, Drapkin reiterated his comments regarding the enforceable nature of the LATS: "[D]on't worry you're going to get the license or you're going to get a merger.... You've got the Term Sheet, it's attached to the thing and this is as good as a definitive agreement." [FN12] Taking Drapkin at his word [FN13] that the parties already had agreed on the essential terms of a license agreement if the merger talks fell through, PharmAthene continued to negotiate a merger letter of intent.

FN8. Richman Dep. 114.

FN9. *Id.* at 163.

FN10. *Id.* 163–64.

FN11. POM App. Vol. 10 Ex. 127, Dep. of David Wright, President and CEO of PharmAthene, 103–04.

FN12. *Id.* at 143, 145.

FN13. Drapkin made statements on at least three occasions that PharmAthene contends led it to believe that an agreement had been concluded: In the January 17, 2010 telephone conversation Drapkin had with Richman mentioned *supra* and the February 22 and March 3, 2010 meetings.

***3** On or about March 9, 2006, the parties signed a Letter of Intent ("LOI") with an annexed

Merger Term Sheet ("MTS").[FN14] The LOI stated that it was not an offer to complete a merger, but rather an "indication of [the parties'] intention to consummate" a merger between SIGA and PharmAthene.[FN15] In the LOI, the parties agreed to "negotiate in good faith" and "use their best efforts" to execute a definitive merger agreement.

FN14. *See* Brennecke Aff. Ex. I, the LOI and MTS.

FN15. LOI at 1.

The MTS for the merger of PharmAthene into SIGA contained clauses concerning, among other things: tax treatment, consideration, bridge financing, license agreement, financing, and its binding nature. According to the MTS, upon any termination of it or a definitive merger agreement, the parties agreed to negotiate in good faith the terms of a definitive License Agreement in accordance with the terms set forth in the LATS.[FN16] The MTS also provides that, with the exception of the Fiduciary Out, Expenses, and Exclusivity sections, it "is non-binding and only an expression of interest and is subject in its entirety to the negotiation and execution of a definitive Merger Agreement." [FN17]

FN16. MTS at 4.

FN17. *Id.* at 6.

3. The Bridge Loan Agreement

In March 2006, SIGA required capital and PharmAthene agreed to provide it. On March 20, 2006, the parties entered into a Bridge Note Purchase Agreement, referred to in the Complaint as the Bridge Loan Agreement, pursuant to which PharmAthene loaned SIGA $3 million. The Bridge Loan Agreement provided that the $3 million would be used for "(i) expenses directly related to the development of SIGA 246, (ii) expenses relating to the Merger and (iii) corporate overhead." [FN18] PharmAthene contends that it made the bridge loan in reliance on the parties' agreements for a continuing relationship with respect to ST–246, whether the relationship ultimately took the form of a merger under a merger agreement or a license agreement in accordance with the LATS.

FN18. Brennecke Aff. Ex. J, the Bridge Loan Agreement, § 2.6.

The Bridge Loan Agreement explicitly recognized, however, the possibility that the parties ultimately might not agree on either a merger or a license agreement. Specifically, section 2.3 provides that:

> Upon any termination of the Merger Term Sheet ..., termination of the Definitive Agreement relating to the Merger, or if a Definitive Agreement is not executed ..., 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 attached as Exhibit C and [SIGA] agrees for a period of 90 days during which the definitive license agreement is under negotiation, it shall not, directly or indirectly, initiate discussions or engage in negotiations with any corporation, partnership, person or other entity or group concerning any Competing Transaction without the prior written consent of the other party or notice from the other party that it desires to terminate discussions hereunder.[FN19]

FN19. *Id.* § 2.3.

The Bridge Loan Agreement further states: "This Agreement and the purchase documents and the rights and obligations of the parties under this Agreement and the purchase documents shall be governed by, and construed and interpreted in accordance with, the laws of the State of New York, without regard to principles of conflicts of laws." [FN20]

FN20. *Id.* § 7.11 (emphasis omitted).

***4** PharmAthene adduced evidence that in addition to providing financing to SIGA and pursuant

to its contractual obligations to work cooperatively to develop, secure approval for, and market ST–246, it provided assistance to SIGA with regard to "regulatory activities, quality assurance, quality control, business development activities, government affairs and policy activities." [FN21] The evidence also supports a reasonable inference that PharmAthene provided such technical support and that it entered into the Bridge Loan Agreement to provide financial support only under the assumption that it would end up with control of ST–246. As Richman stated, "[m]y understanding is that there never would have been a bridge loan if there wasn't some mechanism in place that guaranteed PharmAthene rights to the product. Whether it was the License Agreement or the merger, it was one or the other." [FN22]

FN21. Richman Dep. 89.

FN22. *Id.* at 215.

4. The Merger Agreement

Subsequently, SIGA and PharmAthene negotiated and agreed on the terms of a merger agreement. During these negotiations, SIGA represented to PharmAthene that the merger was a sound business decision because SIGA had reviewed the facts and concluded that the depth, experience, and diversity of PharmAthene's management could assist in bringing ST–246 to market and that PharmAthene had a broad investment base and experience in raising substantial amounts of capital which would provide an immediate value to SIGA and its shareholders. On June 8, 2006, the parties executed the Merger Agreement. Similar to § 2.3 of the Bridge Loan Agreement, § 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 attached as ***Exhibit H*** and SIGA agrees for a period of 90 days during which the definitive license agreement is under negotiation, it shall not, directly or indirectly, initiate discussions or engage in negotiations with any corporation, partnership, person or other entity or group concerning any Competing Transaction ... without the prior written consent of Pharmathene or notice from Pharmathene that it desires to terminate discussions hereunder. [FN23]

FN23. Brennecke Aff. Ex. K, the Merger Agreement, § 12.3.

Section 13.3, the further action clause, provides: "Each of the parties hereto shall use such party's best efforts to take such actions as may be necessary or reasonably requested by the other parties hereto to carry out and consummate the transactions contemplated by this Agreement." [FN24] Further, under § 12.4, the good faith and best efforts provisions of the Merger Agreement, set forth in §§ 12.3 and 13.3, survive its termination. Additionally, § 13.5 states that the Merger Agreement shall be governed by Delaware law. The Merger Agreement, however, also included a provision that if the transaction did not close by September 30, 2006, either party could terminate the deal.

FN24. *Id.* § 13.3.

5. Events following the Merger Agreement

***5** After entering into the Merger Agreement, PharmAthene and SIGA continued to work together to develop ST–246 throughout the summer of 2006. In the meantime, ST–246 began to achieve several significant success thresholds. For example, at or about this time, the parties learned the clinical trials of ST–246 showed signs of great success and would demonstrate 100% protection against smallpox in primates, even when administered after exposure. According to PharmAthene, its capital contributions, management, know-how, collaborative efforts on behalf of ST–246, and fulfillment of its contractual undertakings greatly contributed to this success of ST–246. As the September 30, 2006 deadline approached, PharmAthene sent SIGA a

letter requesting an extension, but SIGA never responded.

On October 4, 2006, SIGA sent PharmAthene a notice terminating the Merger Agreement on the ground that the September 30 deadline had passed. Between October 6 and October 12, 2006, PharmAthene attempted to contact SIGA regarding the LATS and the parties' ongoing relationships, but received no response. On October 12, PharmAthene sent to SIGA for execution a definitive License Agreement, generally in accordance with the terms of the LATS. On October 13, 2006, SIGA responded that it would review the draft by October 16 and get back to PharmAthene.

On October 18, 2006, SIGA publicly announced the results of its clinical trials showing that ST–246 "completely prevents smallpox disease in [a] preliminary primate trial" even when administered after exposure.[FN25] SIGA's stock soared. The next day, SIGA informed PharmAthene that it had obtained an additional $9 million of capital in a private placement and wished to pay back the Bridge Loan.

> FN25. POM App. Vol. 9 Ex. 96, Oct. 18, 2006 SIGA Press Release.

As to PharmAthene's requests for action on the License Agreement, SIGA proposed the parties meet on November 6, 2006 to engage in a "robust discussion." [FN26] When they met, SIGA stated that it did not consider the LATS binding and that the terms reflected in that document no longer were acceptable. PharmAthene disagreed. Next, SIGA proposed to present and PharmAthene agreed to consider a formal partnership proposal.

> FN26. POM App. Vol. 4 Ex. 69, E-mail from Nicholas Coch to Elliot Olstein.

On November 21, 2006, SIGA forwarded to PharmAthene a 102–page document, entitled "Limited Liability Company Agreement" (the "Draft LLC Agreement"). According to PharmAthene, this document completely ignored the LATS. For example, SIGA proposed the following changes from the LATS to the Draft LLC Agreement: the upfront payment from PharmAthene to SIGA required for a license of ST–246 increased from $6 million to $100 million; the milestone payments increased from $10 million to $235 million; and the royalty percentage to be owed to SIGA doubled. After reviewing the Draft LLC Agreement, PharmAthene disputed SIGA's claim that the LATS was not binding, but offered to continue to negotiate in good faith a license agreement consistent with the terms set forth in the LATS [FN27] and to consider additional terms consistent with the LATS.

> FN27. In this regard, PharmAthene offered to make at least one significant change to the LATS. While, in its view, it was not obligated to consider any changes to the LATS, PharmAthene expressed a willingness to consider a 50/50 profit split instead of a royalty. Richman Dep. 285–87.

***6** On December 12, 2006, SIGA advised PharmAthene that further discussions about a potential partnership would not be fruitful if the parties could not meet "without preconditions" relating to the LATS, the Bridge Loan Agreement, and the Merger Agreement. PharmAthene then commenced this action on December 20, 2006.

C. Procedural History

PharmAthene's Complaint asserts seven claims for relief. The first four counts allege the existence of a contract between PharmAthene and SIGA either in the form of a license agreement in accordance with the terms of the LATS or an enforceable obligation to execute such a license agreement. Count One, for example, essentially seeks specific performance. It alleges PharmAthene offered SIGA a "definitive license agreement" in accordance with the LATS, the Bridge Loan Agreement, and the Merger Agreement and seeks an order directing SIGA to execute that license agreement or such other license agreement in accordance with the terms of the referenced documents as the court dir-

ects. Counts Two through Four also rely on the LATS, the Bridge Loan Agreement, and the Merger Agreement, among other things. Count Two seeks a declaratory judgment that SIGA is obligated to execute a license agreement as in Count One and "is precluded from entering into a license agreement for SIGA–246 with any third party or otherwise exploiting the benefits of SIGA–246 developed in collaboration with PharmAthene." Counts Three and Four both sound in breach of contract and seek damages. Count Three asserts SIGA and PharmAthene, through the referenced documents and their conduct, entered into an enforceable license agreement, and that SIGA breached that agreement. The alleged breach in Count Four is of SIGA's obligation to execute a definitive license agreement in accordance with the LATS and other referenced documents.

As to the remaining Counts of the Complaint, PharmAthene also seeks damages for breach of contract in Count Five. The alleged breach, however, is of SIGA's express duty under the Bridge Loan Agreement and the Merger Agreement "to negotiate in good faith towards execution of 'a definitive license agreement in accordance with the terms set forth' in the [LATS]" and its duty under the Merger Agreement to use its "best efforts ... to carry out and consummate the transactions contemplated" by the Merger Agreement, which included the execution of a definitive license agreement. PharmAthene seeks relief in Count Six on a theory of promissory estoppel, and in Count Seven on a theory of unjust enrichment.

On January 16, 2008, I denied SIGA's motion to dismiss the Complaint in its entirety pursuant to Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

PharmAthene filed an Amended Complaint on May 5, 2009. SIGA filed an Answer to the Amended Complaint and Counterclaim on October 21, 2009. On March 19, 2010, SIGA moved for partial summary judgment pursuant to Rule 56(c) seeking to dismiss Counts One through Four of the Amended Complaint and to preclude recovery by PharmAthene of any expectation damages it claims to have suffered. This Memorandum Opinion constitutes the Court's ruling on that motion.

II. ANALYSIS

A. Standard For Summary Judgment

***7** Summary judgment may be granted where the moving party demonstrates that there is no genuine issue of material fact in dispute and that it is entitled to judgment as a matter of law.[FN28] In the context of a summary judgment motion, "[a] fact is material if it might affect the outcome of the suit under the governing law," but "it is not enough that the nonmoving party put forward a mere scintilla of evidence; there must be enough evidence that a rational finder of fact could find some material fact that would favor the nonmoving party in a determinative way drawing all inferences in favor of the nonmoving party." [FN29] I also note, however, that the Court maintains the discretion to deny summary judgment if "a more thorough development of the record would clarify the law or its application." [FN30]

FN28. Ct. Ch. R. 56(c); *O'Brien v. IAC/Interactive Corp.*, 2009 WL 2490845, at *4 (Del. Ch. Aug. 14, 2009).

FN29. *Deloitte LLP v. Flanagan*, 2009 WL 5200657, at *3 (Del. Ch. Dec. 29, 2009).

FN30. *Cooke v. Oolie*, 2000 WL 710199, at * 11 (Del. Ch. Oct. 14, 2005).

B. Is SIGA Entitled to Summary Judgment on PharmAthene's Breach of Contract Claim?

1. Is the LATS enforceable as a contract?

In order for a contract to be binding under Delaware law, the contracting parties must have agreed on all essential terms.[FN31] Moreover, where "commercial parties draft a term sheet that is intended to serve as a template for a formal contract, the law of this state, in general, prevents the enforcement of the term sheet as a contract if it is subject to future negotiations because it is, by

definition, a mere agreement to agree." FN32

FN31. *Patel v. Patel,* 2009 WL 427977, at *3 (Del.Super.Feb.20, 2009); *see also Intellisource Gp., Inc. v. Williams,* 1999 WL 615114, at *4 (D.Del. Aug. 11, 1999) ("there can be no contract when an essential term is missing"). Various cases refer to "material terms" rather than "essential terms." *See, e.g., Int'l Equity Capital Growth Fund, L.P. v. Clegg,* 1997 WL 208955, at *9 n. 3 (Del. Ch. Apr. 22, 1997) ("Delaware law ... require[s] the parties to have reached agreement on all material terms before an 'agreement to agree' will be enforced."); *Ramone v. Lang,* 2006 WL 905347, at *10 (Del. Ch. Apr. 3, 2006). For purposes of this opinion, I will treat the standard as requiring agreement on all essential terms and assume that "essential" and "material" are synonymous.

FN32. *Certainteed Corp. v. Celotex Corp.,* 2005 WL 217032, at *14 (Del. Ch. Jan. 24, 2005).

a. For purposes of SIGA's motion, I assume the parties intended the LATS to he binding

Counts One through Four of the Amended Complaint are premised on the notion that the parties came to agreement on an enforceable licensing agreement. A dispute over the enforceability of a term sheet or memorandum of understanding typically involves two questions: (1) whether the parties intended to be bound by the document; and (2) whether the document contains all the essential terms of an agreement.FN33 SIGA has admitted for purposes of its motion for summary judgment only that the parties intended the LATS as it was attached to the MTS, the Merger Agreement, and the Bridge Loan Agreement to be a binding agreement. FN34 Moreover, the evidence submitted by PharmAthene in opposition to SIGA's motion supports a reasonable inference that the negotiators for the parties subjectively believed that the LATS reflected their agreement on all essential terms of a license agreement, if it became necessary to proceed by way of a license rather than a merger. Therefore, I start with the premise that both parties intended to be bound by the LATS and that they believed it dealt with all essential terms. SIGA argues, however, that whether "the parties intended to be bound to certain terms or to a purported agreement is not in any way determinative as to whether the alleged agreement nonetheless is unenforceable because it lacks essential terms." FN35

FN33. *See, e.g., Hindes v. Wilm. Poetry Soc'y,* 138 A.2d 501, 502–04 (Del. Ch.1958); *SDK Invs., Inc. v. Ott,* 1996 WL 69402, at *7, 11 (E.D.Pa. Feb. 15, 1996).

FN34. Transcript of July 22, 2010 hearing on SIGA's motion for partial summary judgment ("Tr.") at 5, 13.

FN35. DRM 10.

In support of its position, SIGA relies on cases that have held that even if a court finds (or the parties admit) that the parties intended to be bound by an agreement, a court still may find such an agreement to be unenforceable because it lacks essential terms.FN36 In *SDK,* for example, the defendant "[did] not deny that he intended to be bound by the terms of the May 26 Letter Agreement." Nevertheless, the court concluded that the agreement was unenforceable because the parties had not reached agreement on all essential terms. In particular, the parties' letter agreement stated that "the parties agree to purchase equity in the new corporation on 'mutually agreeable' terms," which the court deemed merely an agreement to agree. FN37 The facts of this case, however, are less clear cut and required a more nuanced analysis.

FN36. *See SDK Invs., Inc. v. Ott,* 1996 WL 69402, at *7, 11; *Hindes,* 138 A.2d at 502–04.

FN37. *SDK,* 1996 WL 69402, at *7.

b. Does the LATS contain all essential terms?

***8** SIGA argues that when viewed objectively, the LATS does not constitute an enforceable licensing agreement because there are material terms missing and it does not, therefore, reflect agreement on all "essential" terms. In *Loppert v. WindsorTech, Inc.,*[FN38] Chancellor Chandler stated the test for determining whether all essential terms have been agreed upon as follows:

FN38. 865 A.2d 1282 (Del. Ch.2004).

> [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.... [FN39]

FN39. *Loppert,* 865 A.2d 1282 (citing *Leeds v. First Allied Conn. Corp.,* 521 A.2d 1095, 1097 (Del. Ch.1986)).

In *Loppert,* the court had to decide whether the parties, David Loppert and WindsorTech, Inc., had reached a binding settlement agreement. WindsorTech's counsel made a settlement proposal and Loppert's counsel said it was acceptable except for a provision regarding the size and exercise price of a stock options grant. Counsel for both sides negotiated this point further and eventually reached agreement. Loppert's counsel said "we have a deal" to which WindsorTech's counsel said "good-i'll [sic] let the company know." [FN40] The question presented to the court was whether the terms of the parties' apparent oral agreement constituted an agreement on all essential terms.

FN40. *Id.* at 1285.

Using the test delineated above, the court found that 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 particular draft language, including certain "boilerplate" terms.[FN41] The *Loppert* case, therefore, supports PharmAthene's position that parties can enter into an enforceable agreement, even if certain details are subject to future negotiations, so long as the parties have agreed on all essential terms.

FN41. *Id.* at 1289.

Another case that applies the same test as *Loppert* is *Parker–Hannifin Corp. v. Schlegel Electronic Materials, Inc.*[FN42] The dispute in *Parker* arose out of settlement negotiations between Parker–Hannifin and Schlegel Materials over alleged patent infringements. The parties had come to agreement on all but two critical issues: Schlegel's concerns about potential future litigation and monetary compensation.[FN43] Parker made what the court found to be a settlement offer as to these terms, which Schlegel then accepted. [FN44] Parker took further actions consistent with an agreement having been reached, such as sending an e-mail confirmation of Schlegel's oral acceptance. Later, however, Parker reversed field and denied the existence of an enforceable agreement because its letter proposal did not contain certain allegedly essential terms, such as the territorial scope of the license and representations and warranties.[FN45] But, the court rejected Parker's argument that these were "essential" terms because either they were not included in Parker's initial draft of the licensing or settlement agreement or, when rejected by Schlegel on the first review, were not resuggested by Parker. [FN46] The court found that if these items had been so important, Parker would have raised them at an earlier stage of negotiations.

FN42. 589 F.Supp.2d 457 (D.Del.2008).

FN43. *Id.* at 463.

FN44. *Id.*

FN45. *Id.*

FN46. *Id.*

***9** Similar to the facts in *Parker,* PharmAthene

has produced evidence, namely, the testimony of Richman, which, viewed in a light favorable to PharmAthene, shows that only two terms of the LATS remained to be negotiated in January 2006. [FN47] As in *Parker,* Drapkin appears to have made an offer, which PharmAthene then accepted. It would be reasonable, therefore, to conclude that the parties had reached agreement on all essential terms as of late January 2006 and all that remained to be negotiated were certain boilerplate items.

FN47. Richman Dep. 64–65.

Admittedly, the fact that the LATS was not signed and contains a legend on each page stating "Non Binding Terms," supports a contrary inference that the LATS was not intended to be binding in January 2006 and did not contain all the essential terms of an agreement. PharmAthene's claims, however, do not rest solely upon the LATS as a freestanding document as it existed in or around January 2006. The fact that the LATS was attached to the MTS, the Merger Agreement, and the Bridge Loan Agreement, together with the negotiating history alleged by PharmAthene in terms of the communications between one or more of its representatives and Drapkin provide ample support for an inference that the parties believed the LATS contained all the essential elements of a licensing agreement.

Under the *Loppert* test as applied in that case and in *Parker,* PharmAthene has a plausible claim that both parties believed their negotiations had resulted in an agreement as to all essential terms. PharmAthene has presented evidence, perhaps most notably the statements alleged to have been made by Drapkin discussed *supra,* from which a reasonable negotiator plausibly could conclude that the negotiations had resolved all essential terms.

By contrast, SIGA argues that both expert testimony and case law establish that the LATS lacked several essential terms because certain provisions omitted from the LATS are objectively material. For example, SIGA relies on the testimony of its licensing expert, Norman A. Jacobs, who opined that "there are significant open and material terms missing from the January 26 Term Sheet." [FN48] The essential terms missing according to Jacobs include: (1) minimum annual funding obligations by PharmAthene for research and development, clinical work, and post-approval sales and marketing; (2) the structure, authority, and composition of committees, including the R & D committee and any committees needed to oversee regulatory, clinical, and other commercial issues essential to the drug's success; (3) financial incentives and penalties for the commercialization program; (4) ownership and licensing of new technology; (5) dispute resolution; and (6) designation of governing law.[FN49]

FN48. Brennecke Aff. Ex. Y, Expert Report of Norman A. Jacobs, ¶ 5 .9.

FN49. SIGA argues in the alternative that the so-called licensing agreement was intended to be a partnership agreement. If viewed as a partnership agreement, SIGA argues that the LATS similarly fails because it does not include a number of material business and financial provisions defining the structure of a partnership, including: (1) assets or funds to be contributed to the partnership by each partner; (2) valuation of SIGA technology to be contributed; (3) initial ownership percentages for each partner; (4) the partnership's management structure; and (5) the conditions for and consequences of termination or dissolution of the partnership. *Id.* Because genuine issues of material fact exist as to whether the parties intended to enter into a partnership agreement, as opposed to a licensing agreement, these aspects of SIGA's argument cannot be decided on summary judgment.

SIGA primarily relies on the testimony of Jacobs, but also references the testimony of PharmAthene's licensing expert, Mark G. Edwards, who acknowledged that "[t]here are terms that one typic-

ally finds in fully delineated sponsored development agreement[s] that are missing from this [LATS]," including provisions concerning governing law, dispute resolution mechanisms, right to license, and a number of more functional definitions. [FN50] Edwards' acknowledgement that the term sheet may be less robust than a fully integrated agreement, however, does not mean that essential terms were omitted. Indeed, Edwards effectively opined that the LATS contains sufficient details to constitute a binding agreement. Referring to his review of publicly available information regarding a number of licensing term sheets, Edwards stated:

> FN50. Brennecke Aff. Ex. Z, Dep. of Mark G. Edwards, at 265–66.

> ***10** Three such instances with similar levels of detail as the LATS are available in the appendix to this report. 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.[FN51]

> FN51. POM App. Vol. 5 Ex. 80, Edwards' Expert Report, at 17 n. 11.

Thus, there is conflicting expert testimony on this issue that presents either a question of fact or a mixed question of fact and law.

Finally, SIGA cites cases that hold certain provisions to be material, such that their omission would render a putative agreement unenforceable. According to SIGA, therefore, some of the terms omitted from the LATS are essential terms as a matter of law.[FN52] For example, SIGA relies on *L–7 Designs,* in which the court held that "annual guaranteed minimum royalties ... and the amount to be spent on marketing support" were material terms.[FN53] *L–7 Designs* and other cases cited by SIGA support the proposition that the omission of certain terms *may* render a licensing agreement unenforceable based on the particular facts and circumstances of a given case. I do not read those cases, however, as holding that the referenced terms are essential to *every* licensing agreement. Ultimately, SIGA may be able to prove that one or more of the provisions omitted from the LATS were essential to the parties' licensing agreement. Nevertheless, I find that it also is plausible that PharmAthene will be able to prove at trial that the LATS does reflect an agreement on all essential terms.

> FN52. *See, e.g., L–7 Designs, Inc. v. Old Navy, LLC,* 2010 WL 157494 (S.D.N.Y. Jan. 21, 2010); *Liberto v. D.F. Stauffer Biscuit Co.,* 441 F.3d 318, 324 (5th Cir.2006) (purported agreement held unenforceable because it lacked all essential terms of a license agreement including "the grounds for its renewal or termination").

> FN53. *L–7 Designs,* 2010 WL 157494, at *7.

C. Is the LATS Sufficiently Definite to Warrant the Remedy of Specific Performance?

SIGA also seeks partial summary judgment as to Count One to the extent it seeks specific performance. SIGA argues that specific performance is inappropriate here because the parties did not enter an enforceable agreement with terms definite enough to allow the Court to devise a clearly articulated specific performance order. As SIGA notes, "[u]nder Delaware law, a party seeking the equitable remedy of specific performance must prove the existence and terms of an enforceable contract by clear and convincing evidence." [FN54] Where essential terms are lacking, "a court is not permitted to insert its own judgment and terms" as "it is a fundamental principle of equity that the remedy of specific performance will only be granted as to an agreement which is clear and definite and as to which there is no need to ask the court to supply essential terms." [FN55]

> FN54. *See Min. Invco of RSA No. 7, Inc. v. Midwest Wireless Hldgs.,* 902 A.2d 786, 793 (Del. Ch.2006).

FN55. *Liquor Exch., Inc. v. Tsaganos,* 2004 WL 2694912, at *2 (Del. Ch. Nov. 16, 2004).

As with the issue of whether the LATS constituted a binding and enforceable contract, discussed *supra* Part II.B. 1.b, the question of whether the remedy of specific performance is available to PharmAthene also turns on whether the LATS contained all essential elements. Moreover, to obtain specific performance, PharmAthene must prove the existence of an agreement on all essential terms by the higher standard of clear and convincing evidence. Nevertheless, I am not convinced that PharmAthene will be unable, as a matter of law, to prove that it reached agreement with SIGA on all essential terms of a licensing agreement that is sufficiently definite to be specifically enforced.

***11** This conclusion is supported by the well-accepted maxim of this Court's equity jurisdiction that equity will not suffer a wrong without a remedy. [FN56] PharmAthene has adduced sufficient facts to support one or more of its claims that SIGA breached its agreement with PharmAthene as it related to the contemplated licensing agreement. Yet, even if PharmAthene prevails on the merits of those claims, it will be challenging, due to the nature of the business involved here, to formulate an appropriate remedy. In these circumstances, I consider it prudent and in the interest of justice to defer deciding the issue of specific performance until the legal and factual record has been fully developed at trial. [FN57] Therefore, I deny SIGA's motion for partial summary judgment as to Count One.

FN56. *Agostino v. Hicks,* 2004 WL 443987, at *7 (Del. Ch. Mar. 11, 2004).

FN57. *See Cooke v. Oolie,* 2000 WL 710199, at * 11 (Del. Ch. Oct. 14, 2005).

D. Are Estimates of Expectation Damages Too Speculative?

1. Can PharmAthene meet the threshold of reasonable certainty?

Under Delaware law, a plaintiff can only recover those damages which can be proven with reasonable certainty.[FN58] Moreover, "[n]o recovery can be had for loss of profits which are determined to be uncertain, contingent, conjectural or speculative." [FN59] Delaware courts also have noted how difficult it is to accurately predict damages related to a new business with an unproven technology.[FN60] Lastly, damages "are to be measured as of the time of the breach." [FN61]

FN58. *See, e.g., Chemipal Ltd. v. Slim–Fast Nutritional Foods Int'l, Inc.,* 350 F.Supp.2d 582, 597 (D.Del.2004) ("It is clear that, in order to recover profits lost by defendant's breach of contract, the plaintiff must lay a basis for a reasonable estimate of his loss.... Speculative damages are not recoverable").

FN59. *Callahan v. Rafail,* 2001 WL 283012, at *1 (Del.Super.Mar.16, 2001).

FN60. *Amaysing Techs. Corp. v. Cyberair Commc'ns, Inc.,* 2004 WL 1192602, at *4–5 (Del. Ch. May 28, 2004).

FN61. *Comrie v. Enterasys Networks, Inc.,* 837 A.2d 1, 17 (Del. Ch.2003); *Scully v. U.S. Wats, Inc.,* 238 F.2d 497, 512 (3d Cir.2001) (noting "general breach of contract rule" that damages are measured as of the "date of breach").

The primary damages theory advanced by PharmAthene is based on its expectation damages, which is the amount of money it would take to put the promisee, PharmAthene, in the same position it would occupy if the promisor had performed the contract.[FN62] SIGA contends that expectation damages are too speculative in the context of this case. It argues that future profits for new pharmaceuticals, in general, are speculative because of the risky nature of the drug development process.[FN63] SIGA further asserts that estimates of any expectation damages suffered by PharmAthene with re-

spect to ST–246 are particularly unreliable because they involve a number of unique uncertainties relating to the approval process and potential market size for this drug. [FN64]

FN62. *See Duncan v. Theratx,* 775 A.2d 1019, 1022 (Del.2001).

FN63. DRM 21.

FN64. SIGA also contends that there are a number of potential flaws with the Basis I estimate of PharmAthene's expectation damages by PharmAthene's damages expert, Jeffrey Baliban, that make it unreasonably speculative. Among others, SIGA raises a number of legitimate concerns with Baliban's analysis such as: (1) although the Biomedical Advanced Research and Development Authority ("BARDA") is empowered to acquire drugs prior to FDA approval, the legislation creating BARDA was less than a day old and a request for proposal for procurement of a smallpox antiviral was still years away when the legislation was enacted; (2) predictive models for regulatory success are difficult to come by for ST–246 both because there are no other treatments for smallpox to compare it to and very few drugs have been approved under the Animal Efficacy Rule; and (3) Baliban's analysis relies in large part upon SIGA's own estimates, which may be impermissible.

Addressing complex issues like this on a piecemeal basis is often problematic. As SIGA's motion only requests *partial* summary judgment, there will be a trial whether or not I grant the motion. In addition, whether or not I grant the damages aspect of SIGA's motion, the liability phase of the trial is unlikely to be any different. Count V of the Complaint, for example, is not subject to SIGA's motion; it seeks damages for breach of SIGA's contractual duty "to negotiate in good faith towards the execution of 'a definitive license agreement in accordance with the terms set forth' in the [LATS]." With the possible exception of the expert testimony on the nature of the terms omitted from the LATS, the evidence relevant to Count V is likely to be virtually identical as to that relevant to Counts One through Four. The only portion of the trial that might be shortened to any appreciable extent by granting summary judgment relates to damages, but I expect at least some of the information and evidence regarding expectation damages to continue to be relevant in any case. This action is scheduled for an eight-day trial in early January 2011. I would not expect the trial time to be reduced by much more than a single day if this Court granted partial summary judgment in SIGA's favor on expectation damages.

***12** At the same time, the amount at stake in this litigation arguably reaches into the hundreds of millions of dollars, if not higher. If I were to grant SIGA's motion for summary judgment as to expectation damages, the Court would be beset at trial with needless and wasteful arguments about the relevance and admissibility of the damages evidence. [FN65] In this regard, I note that PharmAthene credibly alleges that it bargained for and obtained an agreement under which it would control the ST–246 product no matter whether the parties merged or executed a licensing agreement. If I were to accept SIGA's arguments that expectation damages are unrecoverable here as a matter of law, SIGA would seek to limit PharmAthene to its reliance damages (*i.e.,* reimbursement for its out-of-pocket expenses—two to three orders of magnitude less than expectation damages).

FN65. Tr. at 16–17.

A similar situation exists as to PharmAthene's unjust enrichment claim (Count Seven). Because ST–246 has not yet come to market, and thus has generated no revenue, PharmAthene will have difficulty quantifying the amount of any monetary benefit it claims SIGA obtained improperly. The evidence plausibly indicates, however, that ST–246 is likely to be an extremely valuable drug product

with a huge market. Yet, under SIGA's apparent divide and conquer strategy, it hopes to exclude most, if not all, evidence of market potential through its motion for partial summary judgment on expectation damages and relegate PharmAthene to a relatively insignificant monetary award, even if PharmAthene succeeds in proving its claims under Counts Five through Seven of the Complaint. In that case, PharmAthene might prove that it effectively bargained for and obtained an agreement under which it reasonably would have expected to control the ST–246 product, but still receive no rights in the product or any meaningful monetary substitute, while SIGA enjoys all the upside associated with the potential benefits of commercially exploiting ST–246 in the future.

When all of the evidence is in and the arguments are completed, SIGA's position may be vindicated. Until then, I consider it important that the Court have available to it all potentially relevant evidence on the question of an appropriate remedy, which may include some form of expectation damages or related relief.

While SIGA has referred to a number of cases that hold expectation damages in the context of drug development to be speculative, none is from Delaware. [FN66] To some degree, therefore, this is an unsettled area of Delaware law. In addition, the drug product at issue here is rather unique. ST–246 may be used to treat smallpox in the context of a bioterrorist incident. For that reason, it is subject to different rules than most drug products and may be sold to the United States government, for example, even before it has received FDA approval. Therefore, although PharmAthene must overcome significant hurdles to prove expectation damages with reasonable certainty, I am not convinced that these challenges are insurmountable. This Court has discretion to deny summary judgment if "more thorough development of the record would clarify the law or its application." [FN67] Based on that principle and the evidence presented to date, I find that summary judgment is not warranted on the issue of expectation damages.

FN66. *See, e.g., Alphamed Pharms. Corp. v. Arriva Pharms., Inc.*, 432 F.Supp.2d 1319, 1323 n. 3, 1346 n. 43 (S.D.Fla.2006) ; *Pharmanetics, Inc. v. Aventis Pharms., Inc.*, 2005 WL 6000369, at *12–13 (E.D.N.C. May 4, 2005); *Aronowitz v. Health–Chem Corp.*, 513 F.3d 1229, 1239 (11th Cir.2008).

FN67. *Cooke v. Oolie*, 2000 WL 710199, at * 11 (Del. Ch. Oct. 14, 2005).

2. Can damages be based on information not knowable as of the time of the breach?

***13** It is well-settled under Delaware law that expectation damages are to be measured as of the date of the breach.[FN68] SIGA contends, therefore, that any information relating to events that occurred after its alleged breach in 2006 should be inadmissible. In response, PharmAthene disputes that proposition and argues that, under some circumstances, courts have allowed the admission of ex post evidence for purposes of calculating damages.[FN69]

FN68. *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 17 (Del. Ch.2003).

FN69. *Comrie*, 837 A.2d at 17 ("the court may consider events that took place after [the date of the breach] to aid in its determination of the proper expectations as of the date of breach").

The case law suggests that courts must be circumspect about considering events that occurred after an alleged breach for purposes of calculating expectation damages. Nevertheless, in limited circumstances, it is appropriate to do so. Based on the record created in connection with SIGA's motion for partial summary judgment, I conclude that PharmAthene may be able to show that post-breach information is relevant to determining an appropriate damages award or other form of relief.[FN70] Moreover, as previously noted, based on the likely

difficulties of fashioning a potential remedy in this case, the Court is better served by retaining the flexibility to consider all potentially relevant evidence, including evidence regarding what has occurred since the alleged breach.

> FN70. Baliban's Basis II estimate of the damages suffered by PharmAthene is based on information known to the parties as of November 2009, approximately three years after the alleged breach. The additional information known to the parties by 2009, which Baliban's analysis relies upon, includes various milestones reached in the development of ST–246 as well as further definitive information provided by the U.S. government relating to the acquisition of a smallpox antiviral. Indeed, SIGA's argument that estimates of expectation damages suffered by PharmAthene are of a speculative nature is bolstered by the exceedingly large variation of about $600 million between Baliban's initial Basis II estimates and his supplemental Basis II estimates, which relied on data known to the parties as of April 15, 2010. Notwithstanding SIGA's contention that all events which occurred after its alleged breach in 2006 are inadmissible per se, many of the factors that applied to my preliminary review of Baliban's Basis I damages estimate also apply to his Basis II estimate as well. The regulatory approval process and the prospects of a government purchase remain clouded, but I do not consider it advisable to attempt to exclude all post-breach evidence pertaining to damages by way of a summary judgment motion, especially in a case such as this which will be tried to the Court and not a jury. *See* Brennecke Aff. Ex. X, Baliban's Report.

E. Is PharmAthene Entitled to a Patent Measure of Damages?

Lastly, PharmAthene argues that if it had received an exclusive license for ST–246 in accordance with the LATS, it also would have acquired the rights to the patents covering ST–246. PharmAthene, therefore, suggests that the Court could award PharmAthene royalties and a profit split as provided for in SIGA's *Draft LLC* Agreement.

A patent measure of damages, however, is inappropriate in this breach of contract action. Such a remedy is prescribed by statute in 35 U.S.C. § 284, [FN71] which applies only in patent infringement cases. As this is not a patent infringement case, I see no basis to award any form of patent damages, including a reasonable royalty.

> FN71. Section 284 provides: "Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court." 35 U.S.C. § 284.

III. CONCLUSION

For the reasons stated, SIGA's motion for partial summary judgment is denied in its entirety.

IT IS SO ORDERED.

Del.Ch.,2010.
Pharmathene, Inc. v. SIGA Technologies, Inc.
Not Reported in A.3d, 2010 WL 4813553 (Del.Ch.)

END OF DOCUMENT

EXHIBIT C

Not Reported in A.3d, 2011 WL 4390726 (Del.Ch.)
(Cite as: 2011 WL 4390726 (Del.Ch.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.
PHARMATHENE, INC., a Delaware corporation, Plaintiff,
v.
SIGA TECHNOLOGIES, INC., a Delaware corporation, Defendant.

Civil Action No. 2627–VCP.
Submitted: April 29, 2011.
Decided: Sept. 22, 2011.

A. Richard Winchester, Esq., Christopher A. Selzer , Esq., McCarter & English, LLP, Wilmington, Delaware; Roger R. Crane, Esq., Christopher R. Carton, Esq., K & L Gates LLP, New York, New York, Attorneys for Plaintiff.

Andre G. Bouchard, Esq., Sean M. Brennecke, Esq., Bouchard Margules & Friedlander, P.A., Wilmington, Delaware; Harold P. Weinberger, Esq., Jennifer L. Rochon, Esq., Seth F. Schinfeld, Esq., Kramer Levin Naftalis & Frankel LLP, New York, New York, Attorneys for Defendant.

OPINION

PARSONS, Vice Chancellor.

***1** This action arises out of a dispute between two companies involved in the development of pharmaceuticals. The plaintiff and the defendant expressed mutual interest in a transaction through which both parties would collaborate to develop a promising drug that the defendant had acquired. The parties previously had explored a merger and, in light of that history, the defendant insisted that the parties first negotiate a license agreement under which it was certain to obtain timely financing necessary to further develop its drug. The parties then actively negotiated and agreed upon a term sheet for the license agreement. Shortly thereafter, the plaintiff suggested that the parties also explore the possibility of a merger with the understanding that, if it did not occur, they would proceed with the license agreement. The defendant agreed to pursue merger discussions provided the plaintiff gave it a bridge loan to cover its financing needs in the interim. The plaintiff did provide such a loan. While the license agreement term sheet was never signed, it was attached as an exhibit to a later merger term sheet, a merger agreement, and a bridge loan agreement, all of which the parties did sign. Each of these agreements expressly provided that if the merger was not completed, the parties would negotiate in good faith to execute a license agreement in accordance with the terms of the term sheet.

As the parties worked toward closing the proposed merger, the drug at issue passed a number of key development milestones which increased its value. After the merger failed to close within the prescribed timeframe, the defendant terminated the merger agreement and the parties entered a contractually-stipulated ninety-day exclusive negotiating period regarding a license. During these negotiations, the defendant proposed economic terms vastly different than those contained in the term sheet attached to the merger agreement and bridge loan. The plaintiff objected to the defendant's approach and insisted that the defendant was obligated to execute a license agreement with the same or similar terms to those contained in the term sheet. When it became apparent that the parties had reached an impasse, the plaintiff commenced this action.

In its Amended Complaint, the plaintiff has asserted a number of claims that were the subject of an eleven-day trial in January 2011. These claims include: (1) that the defendant breached a binding license agreement containing the same economic terms as those in the term sheet attached to the merger and bridge loan agreements; (2) that the defend-

ant breached its obligations under the merger and bridge loan agreements to negotiate in good faith a license agreement in accordance with the terms contained in the term sheet; (3) that the defendant promised that the plaintiff ultimately would control the drug at issue, either through a license agreement or merger, and that the plaintiff reasonably relied on the defendant's promise to its detriment; and (4) that the defendant was unjustly enriched by the capital and assistance that the plaintiff provided to the defendant during the period in which the parties were working toward closing the merger. The defendant has counterclaimed for damages based on its allegation that the plaintiff breached its obligation to negotiate in good faith by causing the defendant to draft a lengthy proposed agreement that the plaintiff knew it would not consider.

***2** For the reasons stated in this Opinion, I reject the plaintiff's claim that the defendant breached a binding license agreement, but find that the defendant did breach its obligations to negotiate in good faith and that the defendant is liable to the plaintiff under the doctrine of promissory estoppel. Furthermore, I reject the defendant's claim that the plaintiff breached its obligation to negotiate in good faith. In terms of relief, I deny the plaintiff's claims for specific performance of a license agreement with the terms set forth in the term sheet or, alternatively, for a lump sum award of its expectation damages. I conclude, however, that the plaintiff is entitled to share in any profits realized from the sale of the drug in question, after an adjustment for the upfront payments it likely would have had to make had the parties negotiated in good faith a license agreement in accordance with the terms of the term sheet. In addition, the plaintiff is entitled to recover from the defendant a portion of the attorneys' fees and expenses the plaintiff incurred in pursuing this action.

I. BACKGROUND

A. The Parties

Plaintiff, PharmAthene, Inc. ("PharmAthene"), a Delaware corporation with its principal place of business in Annapolis, Maryland, is a biodefense company engaged in the development and commercialization of medical countermeasures against biological and chemical weapons.

Defendant, SIGA Technologies, Inc. ("SIGA"), is a Delaware corporation with its principal place of business in New York City. SIGA is also a biodefense company concentrated on the discovery and development of oral antiviral and antibacterial drugs to treat, prevent, and complement vaccines for high-threat biowarfare agents.

B. Facts

1. SIGA acquires ST–246

In 2004, SIGA paid $1 million and issued one million shares of SIGA stock to ViroPharma Inc. to acquire the technology for a product now known as ST–246, [FN1] an orally administered antiviral drug for the treatment of smallpox.[FN2] At that time, the viability of ST–246, its potential uses, safety, and efficacy, and the possibility of its obtaining government approvals and being the subject of government supply contracts were all unknown. The possibility existed, however, that with the help of cash, marketing, and technical knowledge, ST–246 might become an important weapon against smallpox and, therefore, extremely valuable. There was also the possibility that any money or effort invested in ST–246 would be for naught.

> FN1. ST–246 is alternately referred to as "SIGA–246" and "246."
>
> FN2. In many cases, the facts recited in this Opinion are undisputed and, therefore, are not accompanied by citations to the evidentiary record. Where there is any dispute about factual findings, appropriate citations are provided.

2. SIGA's financial capacity becomes stretched and it approaches PharmAthene to discuss aiding the development of ST–246

By late 2005, SIGA had experienced some difficulties developing ST–246 and bringing it to mar-

ket. SIGA had invested an additional $500,000 to develop the drug and was running out of money.[FN3] It estimated, however, that it needed an additional investment of approximately $16 million to complete the development process.[FN4] Furthermore, NASDAQ had threatened to de-list SIGA shares in August 2005 and SIGA's largest shareholder, MacAndrews & Forbes ("M & F"), was unwilling to invest additional money. As a result, SIGA lacked the financial wherewithal to fund development of the drug by itself and required a substantial financial investment to bring ST–246 to market. SIGA also had never taken a drug to market and lacked much of the administrative infrastructure necessary to do so, including employees with expertise in areas such as regulatory or government affairs, quality assurance, quality control, clinical trials, manufacturing, and business development.

FN3. Trial Transcript ("T.Tr.") 1221–22 (Drapkin), 1373 (Konatich). In citations to the trial transcript, where the identity of the witness is not clear from the text, the witness's surname is indicated parenthetically.

Because SIGA's stock was trading at less than $1 at the time, raising additional equity capital would have been significantly dilutive. Consequently, there was little interest in that option.

FN4. T. Tr. 1397 (Konatich); *see also* JTX 180.

***3** With this as a backdrop, in late 2005 SIGA and PharmAthene began discussing a possible collaboration. Through an exchange of oral and written communications, SIGA and PharmAthene negotiated a framework for their collaboration regarding the development and commercialization of ST–246. Thomas Konatich, SIGA's Chief Financial Officer, contacted Eric Richman, PharmAthene's Vice President of Business Development and Strategies, to discuss the possibility of the companies working together. Richman attempted to discuss a merger, but SIGA resisted that approach because it had tried to accomplish a merger with PharmAthene before, only to be left high and dry when PharmAthene got cold feet.[FN5] According to Richman's contemporaneous notes, SIGA insisted on working out the framework of a license agreement before talking about a merger because of the previous failed merger attempt.[FN6] Moreover, SIGA wanted to focus on getting a cash investment as soon as possible to ensure the development of ST–246.

FN5. T. Tr. 26–27 (Wright). In or about December 2003, SIGA and PharmAthene discussed a potential merger. Ultimately, those discussions failed because of reservations by PharmAthene board members.

FN6. JTX 678; T. Tr. 122–24 (Richman).

As of the end of 2005, both SIGA and PharmAthene recognized that, by a conservative estimate, the market potential for ST–246 was in the range of $1 billion to $1.26 billion. On December 29, 2005, Ayelet Dugary, SIGA's controller, responded to a request from Konatich by forwarding to him a "potential market and gross margin analysis for SIGA–246" reflecting those values.[FN7] The same day, Konatich transmitted that analysis to Richman of PharmAthene and advised him that it was "a rough, and we believe conservative, overview of the market potential of our smallpox drug."[FN8]

FN7. JTX 166.

FN8. *Id.*

3. SIGA and PharmAthene negotiate a license agreement framework

In late 2005 and early 2006, negotiations regarding a license agreement between the parties were conducted primarily by Richman and Konatich. Konatich, however, kept Donald Drapkin, the Chairman of SIGA's board and Vice Chairman of M & F, well informed regarding the status of these negotiations. Drapkin denied having any significant involvement in the negotiations for a license agree-

ment, testifying that he "had no knowledge of that license agreement, or its terms." [FN9] Notwithstanding that testimony, however, the evidence shows that Drapkin provided Konatich with guidance about how to proceed throughout the negotiations.[FN10] Drapkin was particularly focused on getting an infusion of cash as soon as possible to fund the development of ST–246. Moreover, when asked who was running the negotiations for SIGA regarding a license for ST–246, Konatich credibly responded that "[t]he project—program was being run by Mr. Drapkin and I was his instrument." [FN11]

FN9. T. Tr. 1252.

FN10. T. Tr. 1250–51 (Konatich).

FN11. T. Tr. 1406–07.

Both companies put together teams to assist their side in negotiating a license agreement. PharmAthene's team, assembled by Richman, included its Chief Executive Officer, David Wright, Chief Financial Officer, Ronald Kaiser, a board member, Elizabeth Czerepak, as well as its Chief Scientific Officer, Government Affairs Officer, and a member of its business development team. Working on the deal for SIGA were Konatich, Drapkin, Dr. Dennis Hruby, who was SIGA's Chief Scientific Officer, and Michael Borofsky, an in-house lawyer at M & F. On January 3, 2006, Richman sent a proposed term sheet to Konatich and Hruby that he drafted based on his discussions with SIGA.[FN12] In a January 4 reply, Hruby stated: "Thanks for the prompt response. We are most interested in trying to make this a mutually agreeable term sheet and moving on to the next step." [FN13] That same day, Konatich wrote to his colleague Hruby that, "[m]y major problem is with the $2.0 [million] up front. I would like to have at least $3 [million] in cash which would permit the completion of the build out and get us through 2006 without too much trouble...." [FN14]

FN12. JTX 172.

FN13. JTX 173.

FN14. JTX 171; T. Tr. 1416 (Konatich).

***4** Richman forwarded Hruby's comments to other members of PharmAthene's team and subsequently reported to Konatich that "all news is positive—we had a board call at 2:30 today—just ended and Board is very supportive." [FN15] Konatich sent Richman's email to Drapkin and Hruby to which Drapkin replied, "great push hard on cash and guarantees." [FN16] On January 6, 2006, Richman emailed a revised license term sheet to the PharmAthene team based on his communications with Hruby. Richman noted specifically that he "increased up front and total milestones...." [FN17]

FN15. JTX 410.

FN16. JTX 175.

FN17. JTX 721.

Konatich continued to negotiate the specifics of a license agreement term sheet with Richman. On January 9, Konatich obtained an assurance from Richman that he was working on getting a revised draft term sheet to SIGA that day. [FN18] Konatich so advised Drapkin and undertook to forward the proposal as soon as he received it.[FN19] Richman followed up later that day with a revised term sheet. In forwarding that draft to Drapkin, Konatich observed that it was "light on the front end money," but that "[i]f we can turn their stock offer into cash it would be much more attractive." [FN20] Konatich also circulated the revised term sheet and mentioned his concerns about the upfront payment and the proposed private stock component to another SIGA board member involved in the project, Paul Savas.[FN21] Also on January 9, Hruby expressed a generally positive reaction to the PharmAthene proposal, saying that "we shouldn't lose sight of the fact that they are committing to fund all development costs, which is probably worth $10–20 [million], and they are committing to fund product related research at SIGA which might alleviate

some burn and free up ." [FN22] Konatich expressed a similar view saying, "[i]f we can get hard cash up another million or so it might be worth it...." Further commenting to Hruby on what he believed Drapkin's reaction would be, Konatich wrote that "[i]f the five million could be 'guaranteed' payments (over the next 12 months) I think Donny would do it in a minute and I probably would too." [FN23]

FN18. JTX 181.

FN19. JTX 424.

FN20. JTX 425.

FN21. JTX 180; T. Tr. 1428–29 (Konatich). PharmAthene's January 9 draft term sheet called for an upfront license fee of $5 million, of which $2 million would be paid in PharmAthene stock. JTX 425 at 2. Both Konatich and Drapkin were uninterested in the prospect of owning stock in a private company. JTX 425 at 1; T. Tr. 1224 (Drapkin).

FN22. JTX 180.

FN23. JTX 182.

On January 16, 2006, Richman sent Konatich a further revised term sheet that included changes requested by SIGA. This revised term sheet "replaced the $2MM PHTN stock with cash as a milestone, kept the total deal size at $16 [million] and increased the upfront payment to $6MM." In that same email, Richman mentioned that he planned to call Drapkin, as Konatich had suggested.[FN24] Konatich forwarded the revised license term sheet to Drapkin and recommended that he speak to Richman directly to present the position of SIGA's board.

FN24. JTX 9.

On January 17, Drapkin apparently called Richman to discuss the licensing term sheet. According to Richman, in that call, Drapkin stated that he had the draft term sheet in front of him and had two proposed changes. Richman further testified that Drapkin told him that if the changes were acceptable to PharmAthene, then "[w]e have got a deal on the term sheet, and it's ready to present to your board for approval." [FN25] Drapkin does not recall that call and denies saying the parties would have a deal if PharmAthene agreed to two changes. [FN26] Based on the testimony of other witnesses, the relevant documentary evidence, and the facts recited above, I find Drapkin's testimony in this respect unreliable. In particular, I find that the call between Richman and Drapkin did occur and that Drapkin did request the two changes Richman identified.

FN25. T. Tr. 152.

FN26. T. Tr. 1225. One of the changes was for SIGA to receive 50% of any amounts by which net profits on any U.S. government sales exceeded 20%. JTX 11.

***5** At a January 18 PharmAthene board meeting, Richman went over the January 16 term sheet with the directors and explained the changes Drapkin proposed. The minutes of that meeting make no mention of the board having approved the term sheet, and the term sheet was not signed. Jeffrey Baumel, outside counsel to PharmAthene who drafted the minutes, credibly testified, however, that the lack of mention of the term sheet stemmed from his practice of only including such documents in the minutes at the time they were signed.[FN27]

FN27. T. Tr. 358–59.

On January 19, Richman spoke with Drapkin again and told him that the PharmAthene board had approved the license agreement term sheet as revised to reflect the changes they had discussed two days earlier.[FN28] PharmAthene alleges that by this time the discussions relating to a license agreement were complete, the parties had "a deal," and Richman, therefore, believed the parties "could now talk

about a merger." [FN29] Nevertheless, Richman did not send a copy of the revised term sheet to Drapkin until February 10, 2006. When asked why, Richman explained that Drapkin did not ask for one and that he assumed that Drapkin already had made the changes in his own version.[FN30]

FN28. T. Tr. 159–60 (Richman).

FN29. *Id.*

FN30. T. Tr. 160–62, 335.

4. The contents of the license agreement term sheet

On January 26, a clean copy was made of the two-page license agreement term sheet that incorporated Drapkin's two changes (the "LATS").[FN31] The document describes the parties' objective: "[t]o establish a partnership to further develop & commercialize SIGA–246 for the treatment of Smallpox and orthopox related infections and to develop other orthopox virus therapeutics." [FN32] The LATS also sets forth terms relating to, among other things, patents covered, licenses, license fees, and royalties. The LATS is not signed, however, and contains a footer on each page that states "Non Binding Terms."

FN31. JTX 11, LATS.

FN32. LATS at 1.

Without attempting to cover all the details, the LATS contemplates a license agreement along the following lines to support the further development and commercialization of ST–246 for the treatment of smallpox. First, SIGA would grant to PharmAthene "a worldwide exclusive license and [sic] under the Patents, Know–How and Materials to use, develop, make, have made, sell, export and import Products in Field. The right to grant sublicenses shall be specifically included in the license." Second, the license would cover ST–246 and all other related products worldwide covered by the patents and know-how relating to ST–246 and its development and manufacture. Third, the LATS described the makeup of a research and development committee, which would include representatives from both PharmAthene and SIGA. The parties identified twelve categories of tasks relevant to that committee and assigned responsibility for each one to either SIGA or PharmAthene. In addition, PharmAthene agreed to fund the research and development based on a defined budget.

Fourth, the LATS included economic terms. PharmAthene was scheduled to pay a "License Fee" of $6 million in total, which consisted of $2 million cash upfront, $2.5 million as a deferred license fee to be paid twelve months after execution of a license agreement if certain events occurred, and $1.5 million after SIGA obtained financing in excess of $15 million. In addition, the LATS contained a provision under which PharmAthene would pay an additional $10 million based on the achievement of specific milestones relating to certain sales targets and regulatory approvals. The LATS also provided for PharmAthene to make annual royalty payments of 8% on "yearly net sales of Patented Products" [FN33] of less than $250 million, 10% on sales greater than $250 million, and 12% on sales greater than $1 billion. Lastly, the LATS stated that, "[i]n addition, SIGA will be entitled to receive 50% of any amounts by which net margin exceeds 20% on sales to the U.S. Federal Government." [FN34]

FN33. Neither party introduced evidence as to the intended meaning of the term "net sales." As customarily employed in the patent licensing context, however, the term "net sales" normally refers to sales by the licensee to its third-party customers less customary deductions such as for discounts and rebates, allowances for returned product, shipping, and distribution costs. Paul A. Thompson, *Patent and Technology Licensing,* 1025 PLI/Pat 459, 469 (2010).

FN34. LATS at 2.

5. Having agreed upon the principal terms of a

license agreement, the parties begin to discuss a merger

***6** At the PharmAthene board meeting on January 18, 2006, the board also decided that it preferred a merger with SIGA over a license agreement. Richman promptly informed Konatich of that preference. Representatives of PharmAthene and SIGA met on January 23, 2006, at Drapkin's office in M & F's headquarters in New York City, which M & F refers to as the "Townhouse." At this meeting, the parties decided to proceed with merger discussions.[FN35] Because of SIGA's precarious financial position, however, SIGA asked PharmAthene to provide bridge financing to allow SIGA to continue developing ST–246 while merger negotiations proceeded. PharmAthene did not have adequate resources to provide such a loan at the time, but agreed to consider raising the funds for it on the condition that PharmAthene would get at least a license for ST–246 if merger negotiations fell through.[FN36] As Czerepak testified at her deposition, "we [PharmAthene] didn't want to start putting resources and money into a product that we weren't absolutely sure that we at least had a license to. So we were willing to talk about a merger but we didn't want to hold up or put at risk the ability to have a license at least as a fallback." [FN37] Wright similarly testified that "[t]he board and Elizabeth [Czerepak] in particular, was concerned that we could end up being a bank to SIGA. They wanted to ensure ... that we received either a license for ST–246 or we completed the merger agreement." [FN38] SIGA generally agreed to pursue that approach with the understanding that, in the meantime, PharmAthene would supply it with a bridge loan of $3 million.

FN35. JTX 15 at 31.

FN36. T. Tr. 184 (Richman); Dep. of Elizabeth Czerepak ("Czerepak Dep.") 85–86, 88–89, 104, 108–10; T. Tr. 35–36 (Wright) ("The direction of PharmAthene's board was that we would do a bridge loan if it was, you know clear and it was guaranteed that we either received a license to the product, under the terms that had already been negotiated and agreed to by both parties, or a merger went through.").

FN37. Czerepak Dep. 85–86.

FN38. T. Tr. 35.

On February 10, 2006, Wright sent a draft merger term sheet to Drapkin. PharmAthene's draft included the following provision regarding a license agreement:

> SIGA and PharmAthene will negotiate the terms of a definitive License Agreement in accordance with the terms set forth in the Term Sheet ... attached on Schedule 1 hereto. The License Agreement will be executed simultaneously with the Definitive [Merger] Agreement and will become effective only upon the termination of the Definitive Agreement.[FN39]

FN39. JTX 194 at 3.

Drapkin claims that he thought PharmAthene must have been confused about what it wanted [FN40] and that Richman told him that PharmAthene "had no interest in a license agreement .... [but rather] wanted to go back to a merger." [FN41] Yet, Drapkin's testimony in this regard is undermined by his own admission that he understood that PharmAthene wanted to negotiate two documents at once when he received the draft merger term sheet with the license agreement attached.[FN42] It would make little sense for PharmAthene to press for the negotiation of a license simultaneously with a merger agreement if it had no interest in a licensing arrangement.

FN40. T. Tr. 1231 (stating he thought PharmAthene included the provision in the merger term sheet regarding a license agreement "by error").

FN41. T. Tr. 1227.

FN42. T. Tr. 1288–89 (Drapkin).

On February 22, 2006, the parties met once again at the Townhouse. Present on behalf of SIGA were Drapkin and Savas. Baumel, on behalf of PharmAthene, had sought to have a formal license agreement executed simultaneously with the merger agreement as a backup in case the merger did not close, but Drapkin told the PharmAthene contingent that he was not going to pay lawyers to draft a formal license agreement.[FN43] Instead, Drapkin suggested that PharmAthene attach the LATS to the agreement. According to PharmAthene, Drapkin also told them that this approach would be as good as a license agreement and would guarantee PharmAthene, at a minimum, a license if negotiations for a merger fell through.[FN44] According to Baumel, Drapkin stated that "[i]f the deal doesn't close, we can negotiate a definitive license agreement in accordance with those [the LATS] terms and you'll have the license." [FN45] Wright similarly testified that "[a]t one point in this meeting [Drapkin] even instructed Jeff Baumel to put language into the term sheet that would say if the merger didn't happen, then we would get a license based upon the terms that had already been agreed to." [FN46]

FN43. T. Tr. 353–55 (Baumel), 176–77 (Richman), 39 (Wright).

FN44. T. Tr. 353–56 (Baumel).

FN45. T. Tr. 355.

FN46. T. Tr. 39.

*7 PharmAthene accepted Drapkin's suggested approach. The 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.[FN47] During another meeting of the parties on March 6, Drapkin reiterated that "in any case, if the merger doesn't close, [PharmAthene] will get their license." [FN48] On March 10, 2006, the parties signed a merger letter of intent ("LOI") to which they attached the merger term sheet and the LATS. Drapkin signed for SIGA.

FN47. JTX 29.

FN48. T. Tr. 360–61 (Baumel), 188 (Richman), 44–45 (Wright).

6. The Bridge Loan Agreement

On March 20, 2006, SIGA and PharmAthene entered into the Bridge Note Purchase Agreement (the "Bridge Loan Agreement"), pursuant to which PharmAthene loaned SIGA $3 million. The Bridge Loan Agreement provided that the $3 million would be used for "(i) expenses directly related to the development of SIGA 246, (ii) expenses relating to the Merger and (iii) corporate overhead." [FN49] PharmAthene contends that it made the bridge loan in reliance on the parties' agreements that they would have a continuing relationship with respect to ST–246, whether the relationship ultimately took the form of a merger under a merger agreement or a license agreement in accordance with the LATS.

FN49. JTX 36, Bridge Loan Agreement ("BLA"), § 2.6.

The Bridge Loan Agreement explicitly recognized, however, that the parties ultimately might not agree on either a merger or a license agreement. Specifically, Section 2.3 provides that:

> Upon any termination of the Merger Term Sheet ..., termination of the Definitive Agreement relating to the Merger, or if a Definitive Agreement is not executed ..., 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 attached as Exhibit C and [SIGA] agrees for a period of 90 days during which the definitive license agreement is under negotiation, it shall not, directly or indirectly, initiate discussions or engage in negotiations with any corpora-

tion, partnership, person or other entity or group concerning any Competing Transaction without the prior written consent of the other party or notice from the other party that it desires to terminate discussions hereunder.[FN50]

FN50. *Id.* § 2.3.

Representatives of PharmAthene viewed this 90–day exclusive negotiating window as more than sufficient time to negotiate the remainder of a license agreement because the key terms already had been negotiated and the rest was likely to be mere boilerplate.[FN51] By contrast, representatives of SIGA characterized the reference to, and attachment of, the LATS as documenting a mere "jumping off point" for future negotiations of a license agreement should the parties fail to merge successfully. Consistent with the possibility that the parties might not succeed in concluding a license agreement if the merger did not go forward, the Bridge Loan Agreement also included a loan maturity date of two years from the date of the loan and granted PharmAthene a security interest in SIGA's intellectual property.[FN52]

FN51. T. Tr. 48–49 (Wright), 269 (Richman).

FN52. T. Tr. 1517–19 (Grayer); BLA § 1.1 & Ex. D.

***8** The Bridge Loan Agreement also contains a choice of law provision designating New York law.[FN53]

FN53. BLA § 7.11.

7. The parties sign a merger agreement

On June 8, 2006, PharmAthene and SIGA signed a merger agreement (the "Merger Agreement").[FN54] Section 12.3 of that Agreement provides that, if the merger were terminated, the parties would negotiate a definitive license agreement in accordance with the terms of the LATS. Section 13.3 further stipulates that each of the parties would use their "best efforts to take such actions as may be necessary or reasonably requested by the other parties hereto to carry out and consummate the transactions contemplated by this Agreement." Section 12.4 provides for those and certain other provisions to survive the termination of the Merger Agreement.

FN54. JTX 40, Merger Agreement.

The Merger Agreement had a drop-dead date of September 30, 2006. At the time of signing, Drapkin apparently was concerned about the urgency of the parties. He explained to PharmAthene's representatives that he wanted a compressed timeline so that "everybody will rush. And if we need extensions [SIGA will] grant them."[FN55]

FN55. T. Tr. 367–68 (Baumel), 51 (Wright), 199 (Richman).

Key representatives of SIGA understood that a lasting relationship with PharmAthene was likely, if not inevitable, as a result of the talks between the parties. For example, on January 20, 2006, Hruby stated in an email to Konatich that "I don't want any human or monkey data too fast, until all the PharmAthene SIGA agreements are in place. I don't want to queer the deal with anything equivocal."[FN56] Then, in a February 25 report to Drapkin, Hruby commented that the PharmAthene team was "a really strong group of professionals with strengths in many areas of development (clinical, regulatory, manufacturing, etc.). I think they have the ability to facilitate and accelerate the development of ST–246...."[FN57] On March 6, he told other SIGA colleagues that "[a]s soon as the term sheet is signed, we should establish a ST–246 project team and coordinate development efforts...."[FN58] Indeed, even after Hruby was notified of a $5.4 million funding award from the National Institute of Allergy and Infectious Diseases ("NIAID"), a division of the National Institutes of Health ("NIH"), he still expected the drug to fall under the control of PharmAthene. When Konatich wrote to him that "it is a damn shame we had to merge," Hruby re-

sponded, "You got that right.... Had [the former CEO of SIGA] not gotten us behind the curve through ineptitude, we would still be an independent company and standing to make some real dough ... we could have gone all the way ourselves." [FN59]

FN56. JTX 189.

FN57. JTX 230 at 2.

FN58. JTX 232.

FN59. JTX 214.

8. The parties begin to integrate operations and ST–246 achieves several milestones

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.[FN60]

FN60. At trial, SIGA greatly downplayed the contributions of PharmAthene to the success ST–246 enjoyed with the NIH and other agencies. 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.

9. SIGA terminates the merger

***9** As the September 30 closing date for the merger approached, the SEC still had not approved SIGA's draft proxy statement. Both parties had some responsibility for preparing that document and had expected a quicker approval. [FN61] To keep the prospect of a merger alive, PharmAthene asked SIGA to extend the termination date. The success of ST–246 in the interim, however, clearly affected the receptiveness of SIGA's representatives to the anticipated merger with PharmAthene. For example, after receiving the NIH grant, Hruby stated in an email to Drapkin (which he later acknowledged to be an exaggeration) that, "I have grave concerns about the merger as it is currently going forward in that the merged company will not be SBIR [Small Business Innovation Research program] compliant. In that case we would have to shut down [$]30 million in current grants and contracts." [FN62] In response to this email, Steven Fasman, an in-house lawyer at M & F, asked, "should SIGA continue with its merger plans or should it try to go it alone?" [FN63] Then, on October 4, SIGA's board met and, after a presentation by Hruby, decided to terminate the merger.[FN64]

FN61. T. Tr. 206 (Richman).

FN62. JTX 260.

FN63. JTX 436.

FN64. JTX 265.

Later in October 2006, SIGA announced that it had received the September three-year, $16.5 million NIH contract and that ST–246 had provided 100 percent protection against smallpox in a primate trial. In the wake of those announcements, SIGA sold 2 million shares of stock for $4.54 per share, more than three times the $1.40 per share it had traded for in 2005.

10. The parties attempt and fail to negotiate a definitive license agreement

After SIGA terminated the Merger Agreement, PharmAthene hired attorney Elliot Olstein to conclude a licensing agreement with SIGA. On October 12, PharmAthene's Baumel sent a proposed li-

cense agreement (the "Proposed License Agreement") that incorporated the terms of the LATS to James Grayer, outside counsel to SIGA. On October 26, 2006, Olstein sent an email to Nicholas Coch, another outside lawyer for SIGA, in which he expressed PharmAthene's readiness to sign the Proposed License Agreement because it contained "all the essential terms of a license agreement and is completely consistent with the [LATS]." [FN65] Coch responded that SIGA would not provide a revised license agreement before the parties met, stating that the "nature of the negotiations required under the Merger Agreement" necessitated "a robust discussion." [FN66]

FN65. JTX 419.

FN66. JTX 420.

Meanwhile, SIGA apparently had been discussing internally alternative structures for the definitive license agreement the parties were now pursuing in earnest. Though unclear who specifically, someone at SIGA asked Dugary to prepare a revised analysis of the total "past and future [ST–246] related investments and costs" and its potential market.[FN67] The apparent purpose of this request, ultimately, was for Dugary to suggest a revised payment that would support "buy[ing] into a 50% participation in future profits from the product." [FN68] On October 18, 2006, Dugary emailed Fasman, Borofsky, Savas, and Konatich her conclusions: total past and future development costs of ST–246 equaled $39.66 million and, therefore, "an up-front license fee of $40 million" would support a 50/50 deal in her view.[FN69]

FN67. JTX 437 & Attach. at 2.

FN68. JTX 437 Attach. at 2.

FN69. JTX 437 & Attach. at 2.

***10** On November 6, 2006, the parties met for the first time after the termination of the merger to discuss a license agreement. The meeting began with Fasman emphasizing the title of the LATS as a "Siga/PharmAthene *partnership* " and the need, given the clinical progress made on ST–246 since the negotiation of the LATS, to revise some of its economic terms.[FN70] PharmAthene's representatives expressed confusion about SIGA's emphasis on a "partnership" and asserted their position that the parties were bound by the terms already contained in the LATS. Nevertheless, Olstein said PharmAthene was willing to listen to SIGA's proposal "in order to avoid a dispute," and pressed representatives of SIGA as to the specific changes SIGA wanted to make. [FN71] In response, SIGA suggested that an upfront payment of $40–45 million and a 50/50 profit split would be more appropriate. [FN72] The meeting ended with SIGA agreeing to draft a more formal proposal to send to PharmAthene.

FN70. T. Tr. 213–15 (Richman).

FN71. T. Tr. 216 (Richman).

FN72. T. Tr.2084–87 (Fasman); JTX 124 at 1; JTX 125 at 1.

On November 21, 2006, SIGA forwarded to PharmAthene a 102–page document, entitled "Limited Liability Company Agreement" (the "Draft LLC Agreement"). According to PharmAthene, this document completely ignored the LATS. For example, in comparison to the LATS, the Draft LLC Agreement included the following economic changes: (1) the upfront payment from PharmAthene to SIGA increased from $6 million to $100 million; (2) the milestone payments to SIGA increased from $10 million to $235 million; (3) the royalty percentages owed to SIGA increased from 8%, 10%, and 12% depending on the amount of sales to 18%, [FN73] 22%, 25%, and 28%; and (4) SIGA would receive 50% of any remaining profit whereas the LATS provided for profit sharing only from U.S. government sales having a margin of 20% or more.[FN74] 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.[FN75]

FN73. Section 6.5(c)(i) of the Draft LLC Agreement provides for a royalty of only 8% on the first $300 million of annual Net Sales. This percentage, however, appears to have been a typographical error; counsel clarified at trial that both parties understand the Draft LLC Agreement to provide for a royalty rate of 18%, not 8%, on the first $300 million of annual Net Sales. T. Tr. 953. Further references in this Opinion to Section 6.5(c), or to the royalties provided thereunder, thus incorporate that understanding.

FN74. JTX 48, Draft LLC Agreement, §§ 5.1(b), 6.5(b), 6.5(c), 6.1 & Schedule 1. In fact, Fasman intentionally drafted an extremely one-sided proposal. On November 18, Dr. Eric Rose, a SIGA board member and SIGA's current CEO, apparently recognized that the Draft LLC Agreement was almost too good to be true. Rose emailed Fasman to clarify whether "the new partnership entity will pay royalties to SIGA, and in addition SIGA will own half of the LLC?" Fasman responded: "Yes, that's the idea. SIGA will get to draw out the value of its half of the LLC first through the upfront, milestone and royalty payments. Any residual value can then get withdrawn through dividends or liquidation of the entity, so that PHTN can 'catch up' if there are sufficient funds available. In no situation, however, can SIGA ever be forced to give back money if there are insufficient funds to pay anything or PHTN's full share, to PHTN. Thus, SIGA will always be sure to get the value of its creation whether or not PHTN sees any value." JTX 465. This arrangement contrasts sharply with the LATS. As PharmAthene's damages expert Baliban reported, the license agreement contemplated by the LATS would have apportioned to PharmAthene approximately 70% of the total return from ST–246. Yet, under the Draft LLC Agreement proposed by SIGA, PharmAthene would have received only 16%. JTX 673, Baliban Report, ¶ 71.

FN75. Draft LLC Agreement § § 3.2, 3.3, 3.5, 4.2, 5.1(c).

After reviewing the Draft LLC Agreement, Olstein exchanged a series of letters with SIGA's Coch between late November and mid December 2006. Olstein asserted that the terms of the Draft LLC Agreement were "radically different from the terms set forth in the [LATS]," but that PharmAthene was "willing to consider" changes to the LATS, including a 50/50 profit split.[FN76] For its part, SIGA disputed that the LATS was binding because of the "Non Binding Terms" footer and never addressed PharmAthene's proposal for an across-the-board profit split.[FN77] Finally, 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...." [FN78] On December 20, 2006, PharmAthene commenced this action.

FN76. JTX 270.

FN77. JTX 109.

FN78. JTX 125.

C. Additional Background Regarding Relief Sought by PharmAthene

***11** The primary form of relief PharmAthene

seeks is specific enforcement of a license agreement that strictly conforms to the LATS. In the alternative, PharmAthene contends that it has proved a breach of SIGA's obligation to negotiate a license agreement in good faith in accordance with the terms of the LATS and is therefore entitled to expectation damages and the full benefit of its bargain. In support of its claim for expectation damages, PharmAthene introduced testimony from three different experts and extensive documentary evidence to show the degree of those damages. To the extent relevant to the decisions reached in this Opinion, much of that evidence is discussed *infra* in the Analysis section relating to remedies. To put this dispute in context, however, I briefly review here some of the facts underlying PharmAthene's damages claim.

As previously noted, SIGA received a $16.5 million development contract from the U.S. government in September 2006. In addition, it later received government contracts for over $75 million to support the development of ST–246. [FN79]

> FN79. On September 1, 2008, SIGA received a five-year, $55 million contract from NIAID. Shortly thereafter, on September 18, 2008, SIGA received another $20 million from NIAID. Approximately one year later, on September 2, 2009, SIGA received a three-year, $3 million contract from NIH. JTX 151, Baliban Rebuttal Report, at 11–12 (citing SIGA SEC filings disclosing each government contract).

PharmAthene also presented evidence that as of the latter part of 2010 the U.S. government agency tasked with procuring medical countermeasures, the Biomedical Advanced Research Development Authority ("BARDA"), had taken actions which suggested that SIGA ultimately may be awarded a large contract to deliver its smallpox antiviral to the U.S. Strategic National Stockpile ("SNS"). BARDA initially issued a request for proposal for smallpox antivirals (the " Smallpox RFP") in March 2009 as a small business set-aside. In 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.[FN80] 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 in a full and open competition under which a business of any size, including SIGA, would be eligible to receive the award. Indeed, PharmAthene adduced at least some evidence at trial to support an inference that BARDA likely would pursue such an approach if SIGA's appeal fails.

> FN80. *See* SIGA press releases dated October 13, 2010 and November 7, 2010, JTX 666 and 669.

D. Procedural History

PharmAthene's Complaint contained seven separate counts, asserting claims under theories of breach of contract, promissory estoppel, and unjust enrichment. On January 9, 2007, SIGA moved to dismiss the Complaint under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief could be granted. I denied SIGA's motion in its entirety on January 16, 2008.[FN81]

> FN81. *Pharmathene, Inc. v. SIGA Techs., Inc.*, 2008 WL 151855 (Del. Ch. Jan. 16, 2008) [hereinafter *SIGA I*].

After extensive discovery, I granted a motion by PharmAthene to amend its Complaint on May 4, 2009. On May 18, 2009, SIGA filed an Answer and Counterclaim. The Counterclaim alleges that PharmAthene breached its contractual obligation to negotiate in good faith and seeks dismissal of the Amended Complaint, as well as reliance damages and SIGA's attorneys' fees and costs.

***12** On March 19, 2010, SIGA moved for partial summary judgment pursuant to Rule 56(c),

seeking to dismiss Counts One through Four of the Amended Complaint and to preclude PharmAthene from obtaining either specific performance or expectation damages. The parties briefed that motion exhaustively and I heard argument on it on July 22, 2010. In a subsequent Memorandum Opinion, I denied SIGA's motion in its entirety.[FN82]

> FN82. *Pharmathene, Inc. v. SIGA Techs., Inc.*, 2010 WL 4813553 (Del. Ch. Nov. 23, 2010) [hereinafter *SIGA II*].

In January 2011, the Court presided over an eleven-day trial in this action. [FN83] After extensive post-trial briefing, counsel presented their final arguments on April 29, 2011.

> FN83. Trial was held on January 3–7, 10–12, 18–19, and 21.

This Opinion constitutes the Court's post-trial findings of fact and conclusions of law on both PharmAthene's Amended Complaint and SIGA's Counterclaim.

E. Parties' Contentions

In Counts One through Four of its Amended Complaint, PharmAthene alleges that SIGA had certain contractual obligations under the terms of the LATS, as incorporated in the Bridge Loan Agreement and the Merger Agreement. Count One seeks specific performance of an agreement in conformity with the terms of the LATS. Count Two acknowledges that a controversy exists regarding SIGA's obligations under the LATS, the Bridge Loan Agreement, and the Merger Agreement and seeks a declaration obligating SIGA to execute a license agreement with PharmAthene in accordance with the terms of the LATS and precluding it from entering into a joint venture with any other entity to develop ST–246. Count Three seeks damages for breach of contract, alleging that the parties intended to enter into an enforceable contract and commenced performance under it, but that SIGA breached the agreement when it repudiated the existence of any contract. Count Four seeks damages based on SIGA's alleged breach of its duty to execute a definitive license agreement.

As to the remaining counts of the Amended Complaint, Count Five seeks damages based on SIGA's alleged breach of (1) its obligation to negotiate in good faith and execute a license agreement in accordance with the terms of the LATS and (2) its duty to use its best efforts to complete the transactions envisioned under the LATS. Count Six seeks damages on grounds of promissory estoppel. It alleges that SIGA promised PharmAthene that either the parties would merge or it would get a license to ST–246, that PharmAthene reasonably relied on that promise and undertook to assist the development of ST–246, and that PharmAthene suffered harm as a result. Finally, Count Seven seeks damages on the grounds that SIGA was unjustly enriched by the management expertise, technical know-how, and capital it received from PharmAthene to help develop ST–246.

SIGA denies any liability to PharmAthene. Specifically, it denies that the parties ever reached a binding licensing agreement, both because the parties lacked any intent to be bound and because the LATS did not include all of the essential terms necessary to effect such an agreement. Rather, SIGA contends that any agreement the parties had regarding the LATS was merely an unenforceable agreement to agree. SIGA also denies that it promised PharmAthene control of ST–246, either through a merger or a license. Furthermore, SIGA contends that the assistance PharmAthene provided regarding the development of ST–246 was unsolicited and of little value to SIGA. Finally, SIGA asserts in its Counterclaim that it was PharmAthene, not SIGA, that breached its duty to negotiate in good faith a license agreement in accordance with the terms of the LATS. Thus, SIGA claims that PharmAthene caused it to incur unnecessary expense by improperly inducing SIGA to prepare the extensive Draft LLC Agreement and then refusing to consider it in good faith. SIGA accuses PharmAthene of unreasonably refusing to consider the LLC

proposal, or a partnership alternative with economic terms that differed materially from the LATS.

II. ANALYSIS

***13** PharmAthene bears the burden of proving most of its contract and quasi-contract claims by a preponderance of the evidence.[FN84] Two notable exceptions are its specific performance and promissory estoppel claims. PharmAthene must prove each of those claims by clear and convincing evidence, *i.e.,* proof that is "highly probable, reasonably certain, and free from serious doubt." [FN85]

FN84. *See United Rentals, Inc. v. RAM Hldgs., Inc.,* 937 A.2d 810, 834 n. 112 (Del. Ch.2007) ("The burden of persuasion with respect to the existence of the contractual right is a 'preponderance of the evidence' standard.") (citations omitted).

FN85. *Utz v. Utz,* 2003 WL 22952579, at *2 n. 11 (Del. Ch. Dec. 5, 2003); *see also United Rentals* 937 A.2d at 834 n. 112.

A. Did the LATS, Standing Alone, or as Attached to the Merger Term Sheet, the Bridge Loan Agreement, or the Merger Agreement, Constitute a Binding License Agreement or Form of Partnership Contract?

Counts One through Four of Plaintiff's Amended Complaint are premised on the notion that there is a binding agreement between the parties, encompassing the terms set forth in the LATS, such that it effectively constitutes a license agreement. In these four counts, respectively, PharmAthene asks this Court: (1) to order specific performance by requiring SIGA to execute the Proposed License Agreement that PharmAthene provided to SIGA on October 12, 2006 or another agreement that includes the terms of the LATS (Count One); (2) to enter a declaration that SIGA *is* obligated to execute such an agreement (Count Two); (3) to award damages for SIGA's breach and repudiation of the "contract" between the parties (Count Three); and (4) to award damages for SIGA's breach of its alleged contractual duty to execute a definitive license agreement in accordance with the terms of the LATS (Count Four). Thus, I first examine whether PharmAthene has proven the existence of a binding license agreement between itself and SIGA.

PharmAthene contends that the LATS—either when negotiated in January 2006 or later, when attached to the merger term sheet, Bridge Loan Agreement, and Merger Agreement—created a binding contract between the parties that obligated SIGA to enter into a license agreement with substantially the same terms as those contained in the LATS. By contrast, SIGA argues that the LATS was never intended to be binding, was controlled by PharmAthene, and was not even provided to SIGA until weeks after it allegedly was agreed to. SIGA also questions whether the LATS ever was ratified by the PharmAthene board. In addition, it asserts that the LATS, as attached to the merger term sheet, Bridge Loan Agreement, and Merger Agreement, only constituted an agreement to agree on terms at a later date and, thus, is unenforceable.

1. Standard for an enforceable contract

The elements necessary to prove that an alleged agreement constitutes an enforceable contract are: (1) the intent of the parties to be bound by it; (2) sufficiently definite terms; and (3) consideration. [FN86] Here, there is no dispute as to consideration. As with term sheets generally in Delaware, whether the LATS is enforceable depends on two questions: "(1) whether the parties intended to be bound by the document; and (2) whether the document contains all the essential terms of an agreement." [FN87] Courts measure intent to be bound by "overt manifestations of assent, rather than [ ] subjective desires," and look for "an objective manifestation of intent to be bound...." [FN88] An intention to be bound "may be evidenced by continued performance in accordance with an agreement's terms." [FN89] To determine whether a term sheet includes all essential terms, courts consider " 'all of the surrounding circumstances, including the course and substance of the negotiations, prior dealings

between the parties, customary practices in the trade or business involved and the formality and completeness of the document (if there is a document) that is asserted as culminating and concluding the negotiations' .... " [FN90]

FN86. *Carlson v. Hallinan,* 925 A.2d 506, 524 (Del. Ch.2006).

FN87. *SIGA II,* 2010 WL 4813553, at *7 (quoting *Hindes v. Wilm. Poetry Soc'y,* 138 A.2d 501, 502–04 (Del. Ch.1958) and *SDK Invs., Inc. v. Ott,* 1996 WL 69402, at *7, 11 (E.D.Pa. Feb. 15, 1996)).

FN88. *BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp.,* 2009 WL 264088, at *4 (Del. Ch. Feb. 3, 2009).

FN89. *Id.*

FN90. *Patel v. Patel,* 2009 WL 427977, at *3 (Del.Super.Feb.20, 2009) (quoting *Leeds v. First Allied Conn. Corp.,* 521 A.2d 1095, 1101–02 (Del. Ch.1986)).

2. The LATS was not a binding license agreement

a. The LATS as a stand-alone document

***14** PharmAthene and SIGA both had clear objectives when they began negotiating their strategic options. In December 2005, Konatich, SIGA's Chief Financial Officer, contacted Richman, PharmAthene's Vice President of Business Development and Strategies, about a possible collaboration between the companies to continue the development of ST–246. Because SIGA was quickly running out of cash, Konatich primarily sought a license agreement, which would get SIGA the funds it needed faster than a merger would.[FN91] PharmAthene's focus was on securing the rights to ST–246, either through a license agreement or a merger, but it preferred a merger. Nevertheless, PharmAthene focused on a license agreement initially because SIGA essentially insisted that it do so. A transaction in keeping with the LATS would have been consistent with PharmAthene's goal to obtain control of ST–246.

FN91. T. Tr. 1398, 1404 (Konatich), 124–25 (Richman).

Based on PharmAthene's account, it intended to be bound in late January 2006 when its board informally reviewed and approved the LATS. For several reasons, however, I find that the parties did not intend to be bound when the LATS originally was negotiated between Drapkin and Richman. First, although Richman allegedly received approval from the PharmAthene board to accept the two revisions to the terms that Drapkin requested, there is no mention of the LATS or Drapkin's revisions to it or any approval of either of these items in the minutes of the PharmAthene board meeting on January 18. Second, PharmAthene did not send a copy of the revised and final LATS to SIGA for its review or its file for weeks. Indeed, the only evidence that PharmAthene conveyed its acceptance of the LATS to SIGA before February 10, 2006 is Richman's testimony that he told Drapkin by phone on January 19,[FN92] which Drapkin denied. [FN93] Moreover, the LATS was not executed by either party in January 2006 or at any time thereafter, and importantly, the parties included at the bottom of each of the two pages of the LATS the legend "Non Binding Terms—SIGA246 January 26, 2006." These facts indicate that, as of that date, the parties did not intend the LATS to be binding.

FN92. T. Tr. 157–58.

FN93. T. Tr. 1226 (characterizing the January 19 phone conversation as a discussion about proceeding with a potential merger instead of a licensing agreement).

The overall makeup of the LATS supports this conclusion. It is a two-page, typewritten document, entitled, "SIGA/PharmAthene Partnership." The first entry, labeled "Objective," states, "To establish a partnership to further develop & commercialize SIGA–246 for the treatment of Smallpox and

orthopox related infections and to develop other orthopox virus therapeutics." [FN94] Beyond that, however the LATS generally outlines the terms of a potential license agreement. With the sole exception of the entry regarding the "R & D Committee," all of the topics addressed in the LATS relate to a license arrangement. Those topics include: the field of use of specified types of products, the territory of the license, the patents, know-how, and materials covered by the license, the nature of the licenses SIGA was to grant, the license fee, the deferred license fee, milestone payments, and royalties, including the royalty term. The document itself, however, says nothing about its being binding or even about an obligation of the parties to negotiate a license agreement consistent with the LATS.

FN94. LATS at 1.

***15** Early in this litigation, PharmAthene asserted that, as of January 26, 2006, "both parties understood and acknowledged that the [LATS] was a binding agreement." [FN95] By the time of its Post–Trial Opening Brief, however, PharmAthene's position had evolved, especially as relates to the significance of the "Non Binding" footer. There, PharmAthene stated: "Thus, it's clear what the footer meant—that as of Jan. 26, 2006 (the date of the final version of the LATS) the LATS terms standing alone were nonbinding. The footer says nothing, however, about the status of that document after Jan. 26." [FN96]

FN95. JTX 4, Aff. of Eric Richman, dated Mar. 22, 2007, ¶ 8.

FN96. Plaintiff's Post–Trial Opening Brief ("Pl.'s Post–T. Op. Br.") 39.

Based on a careful review of the evidence, I find that PharmAthene either has conceded that the LATS standing alone is nonbinding or has failed to prove by even a preponderance of the evidence that when the parties negotiated the LATS in January 2006 they intended it to constitute a binding license agreement.

b. The LATS as it was incorporated into the merger term sheet, Bridge Loan Agreement, and Merger Agreement

Between February and June 2006, the parties executed three separate documents to which they attached the LATS. On March 10, they signed the merger LOI to which they attached the merger term sheet and LATS. On March 20, the parties entered into the Bridge Loan Agreement, to which they also attached the LATS. Finally, on June 8, SIGA and PharmAthene signed the Merger Agreement, which included the LATS as an attachment. Each of these three documents contains a provision explicitly stating, in effect, that if the merger did not close, the parties would negotiate in good faith a license agreement of ST–246 in accordance with the terms set forth in the LATS.[FN97]

FN97. Because the Merger Agreement ultimately superseded the merger term sheet, I discuss only the Merger Agreement in the remainder of this Opinion. Similar analysis would apply to the merger term sheet.

The parties dispute whether the provision referencing the LATS in either the Bridge Loan Agreement or the Merger Agreement constitutes a binding and enforceable contractual obligation of SIGA. PharmAthene first argues that each of those provisions contractually obligates SIGA to enter into a license agreement with PharmAthene having the terms specified in the LATS.[FN98] SIGA denies that allegation, contending that neither the Bridge Loan Agreement nor the LATS requires it to enter into such a license because, again, (1) the parties did not intend to be bound to such an obligation, and (2) the LATS does not contain all the essential terms of a license agreement for a product like ST–246. Second, PharmAthene asserts that, in any event, the Bridge Loan Agreement and Merger Agreement both obligated SIGA to "negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the [LATS]." [FN99] The latter contention and the issue of whether SIGA violated

any obligation to negotiate in good faith are discussed *infra* with respect to Count Five of the Amended Complaint. There is no dispute the Bridge Loan Agreement and the Merger Agreement bound the parties to negotiate in good faith. PharmAthene also contends, however, that those Agreements, in conjunction with the LATS, imposed a binding obligation on SIGA to enter into a license having the same terms as the LATS. I address that issue next.

> FN98. In this regard, I note that the LATS does not include a choice of law term, but the Bridge Loan Agreement specifies that it is governed by Delaware Law and the Merger Agreement provides that it is subject to New York law. BLA § 7.11; Merger Agreement § 13.5. For the most part, the parties briefed and argued the issues in this case as though Delaware law applied. With one possible exception, they also did not identify any material differences between Delaware and New York law in terms of the issues currently before the Court. That arguable exception relates to the availability of expectation damages for a breach of the duty to negotiate in good faith. As discussed more fully *infra,* SIGA relies on *Goodstein Constr. Corp. v. City of N.Y.,* 80 N.Y.2d 366 (1992), a New York Court of Appeals case, for the proposition that reliance, not expectation, damages are PharmAthene's only available remedy. Defendant's Post–Trial Answering Brief ("Def.'s Post–T. Ans. Br.") 55. Accordingly, unless otherwise noted, I have analyzed the issues presented under Delaware law.
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> FN99. BLA § 2.6.

***16** For many of the same reasons discussed previously regarding the LATS, I am not convinced that both parties intended to be bound to a specific license agreement when they agreed to attach the LATS to executed versions of the Bridge Loan and Merger Agreements. As discussed *supra,* PharmAthene subjectively may have had such an intent to be bound. Its board of directors allegedly ratified the LATS in January 2006 and, by including language in the Bridge Loan and Merger Agreements referring to the LATS and attaching it to those agreements, PharmAthene sought to guarantee its control of ST–246, which was the primary goal of its negotiations with SIGA.

I am not persuaded, however, that SIGA intended to be bound to a license agreement reflecting the terms delineated in the LATS. The "Non Binding Terms" footer points away from an intent to be bound, but it is not outcome determinative. The factual record as to the purpose of that footer is murky, at best. PharmAthene's Richman attempted to avoid the impact of the footer by calling it a mistake and a mere vestige of the initial negotiations regarding the LATS.[FN100] Baumel testified that he deliberately left the "Non Binding Terms" legend on the LATS when it was attached to the Bridge Loan and Merger Agreements because that was the agreement of the parties.[FN101] In addition, SIGA asserts that its counsel always confirmed that the legend was included in the LATS when it was attached to later documents.[FN102] 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. Specifically, I find that it supports the view that the parties did not intend the LATS as attached to these agreements to be a binding license agreement or to require that any later formal agreement include exactly the same terms as the LATS.[FN103]

> FN100. T. Tr. 287–88 (Richman averred 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); *see also* T. Tr. 366 (Baumel) ("This is a dateline footer. It is clearly not a term of a term sheet.").
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> FN101. T. Tr. 366 ("[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 pa- per").

FN102. *See* T. Tr. 1524–26 (Grayer) (testifying that if PharmAthene had sent a new version of the LATS omitting the "Non Binding Terms" legend, Grayer would have confirmed that change with SIGA before attaching the LATS to the Merger Agreement).

FN103. Nevertheless, as discussed further *infra,* 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. *See* T. Tr. 1235–36 (Drapkin).

Other provisions of the Bridge Loan and Merger Agreements further support my finding that the LATS as attached to these agreements did not bind SIGA to enter into a license agreement including the same terms. For example, Sections 2.3 of the Bridge Loan Agreement and 12.3 of the Merger Agreement expressly state that the parties will "negotiate" a license agreement in accordance with the terms of the LATS and recognize that the parties might never enter into a license agreement. In addition, the Bridge Loan Agreement has a maturity date and provides PharmAthene with a security interest in SIGA's assets. For these and the reasons previously stated in this section, I find that PharmAthene has not shown that, when the parties executed either the Bridge Loan Agreement or the Merger Agreement, they intended to bind themselves to enter into a license strictly conforming to the LATS.

3. The LATS does not contain all of the essential elements of a license agreement

The Bridge Loan Agreement and Merger Agreement provisions incorporating the LATS do not constitute a basis for binding SIGA to the terms of the LATS for a second and independent reason: they do not contain all the essential terms of a license agreement for a product like ST–246. In determining whether all essential terms are present, a court must decide whether 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 negotiation .[FN104]

FN104. *SIGA II,* 2010 WL 4813553, at *6 (citing *Loppert v. WindsorTech, Inc.,* 865 A.2d 1282, 1285 (Del. Ch.2004)).

***17** PharmAthene contends this issue should be answered in the affirmative. They emphasize, for example, that Drapkin, who took a lead role for SIGA in the negotiation of the LATS, never mentioned several terms that SIGA now characterizes as essential, such as dispute resolution and the governing law. PharmAthene also relies heavily on Drapkin's alleged statement that the parties "had a deal" as to the LATS around mid January 2006, from which they infer that any terms that remained to be negotiated were mere boilerplate. [FN105] In addition, PharmAthene relies on the testimony and opinions of its licensing expert, Marc Edwards. He testified that the level of detail of the LATS was sufficient to effect a binding agreement between two parties in the biotechnology and pharmaceuticals industry.[FN106] Specifically, from disclosures made to the SEC, Edwards identified six binding letters of intent that, like the LATS, lacked a number of terms SIGA claims were material and essential. Examples of such missing terms include those relating to: diligence, timetable obligations, indem-

nification, competing products, patent prosecution and litigation, confidentiality, ownership and licensing of new technology, and commercialization program particulars.[FN107]

> FN105. As to whether a term sheet includes all essential terms of an agreement, the absence of a boilerplate provision may be immaterial. *See Asten v. Wangner Sys. Corp.,* 1999 WL 803965, at *2–3 (Del. Ch. Sept. 23, 1999).
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> FN106. T. Tr. 977–78.
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> FN107. Edwards also attempted to equate the LATS to three different licensing agreements that were filed with the SEC. JTX 489 at 17 n. 11. As SIGA notes, however, each of those agreements was signed and explicitly labeled as binding. Def.'s Post–T. Ans. Br. 42.

In further support of its position that the LATS does not contain all the essential terms of a license agreement, SIGA presented its own licensing expert, Norman Jacobs. Speaking from a business, as opposed to a legal, perspective, Jacobs opined that significant terms either were completely missing from, or lacked sufficient clarity in, the LATS to form a workable long-term relationship, regardless of whether the LATS contemplated a straight license agreement or a partnership between SIGA and PharmAthene. The terms Jacobs alleged were material but missing from the LATS included: defined funding obligations; details as to the structure, composition, and dispute resolution procedures for the joint research and development committee or any other committees necessary for the development and commercialization of ST–246; delineation of the patent prosecution and infringement responsibilities of the parties; minimum sales or diligence obligations; and, if a partnership was contemplated, provisions detailing the structure of such an arrangement. SIGA also noted that PharmAthene's expert Edwards developed a template of best practices with respect to biotechnology licensing deals which describes numerous aspects of such arrangements that were not included in the LATS. The topics allegedly not addressed differ from the LATS in that they included patent ownership, defense and maintenance costs, governance and dispute resolution mechanisms for joint committees, termination rights, and license maintenance and diligence. In addition, while the LATS was being negotiated, Hruby of SIGA expressed concern to PharmAthene's Richman that important issues regarding patent prosecution and the operation of any joint research and development committee still needed to be discussed. Lastly, SIGA emphasizes the absence in either company's board minutes of a discussion, let alone approval, of a final binding term sheet.

***18** Regardless of whether the parties intended to be bound, "[w]here the[y] fail to agree on one or more essential terms, there is no binding contract." [FN108] Moreover, where, as in this case, a plaintiff seeks specific performance of an alleged contract, the plaintiff must prove by clear and convincing evidence that the agreement contains all essential terms and that they are sufficiently definite to be enforced.[FN109] Paraphrasing the statement of the applicable test in *SIGA II,* I must determine

> FN108. *Patel v. Patel,* 2009 WL 427977, at *3 (Del.Super.Feh.20, 2009) (citation omitted); *Intellisource Gp., Inc. v. Williams,* 1999 WL 615114, at *4 (D.Del. Aug. 11, 1999).
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> FN109. *See Osborn v. Kemp,* 991 A.2d 1153, 1158 (Del.2010) (specific performance requires, *inter alia,* existence of a valid contract); *Patel,* 2009 WL 427997, at *3 (no contract exists where one or more essential terms are missing).

whether a reasonable negotiator in the position of [PharmAthene] would have concluded, in that setting, that the [LATS as attached to the Bridge Loan Agreement or the Merger Agreement] constituted agreement on all of the terms that the

parties themselves regarded as essential and thus that the agreement concluded the negotiations.... FN110

FN110. *SIGA II,* 2010 WL 4813553, at *8 (quoting *Loppert v. WindsorTech, Inc.,* 865 A.2d 1282, 1285 (Del. Ch.2004)).

Having carefully considered all of the relevant evidence, I conclude that the answer to that question is no. In particular, I find that a reasonable negotiator in the position of PharmAthene would not have concluded that the LATS, as attached to the Bridge Loan and Merger Agreements, manifested agreement on all of the license terms that SIGA and PharmAthene regarded as essential. In that context, therefore, such a reasonable negotiator would not have believed that the LATS concluded the parties' negotiations.

In arguing to the contrary, PharmAthene relies primarily on three cases: *Loppert v. WindsorTech, Inc.,*FN111 *Asten, Inc. v. Wangner Systems Corp.,* FN112 and *Parker–Hannifin Corp. v. Schlegel Electronic Materials, Inc.*FN113 Yet, none of these cases supports a finding that the LATS as attached to the Bridge Loan Agreement or Merger Agreement constituted an agreement between the parties on all essential elements of a license to ST–246.

FN111. 865 A.2d 1282 (Del. Ch.2004), *aff'd,* 867 A.2d 903 (Del.2005).

FN112. 1999 WL 803965 (Del. Ch. Sept. 23, 1999).

FN113. 589 F.Supp.2d 457 (D.Del.2008).

PharmAthene likens this case to *Loppert* because it alleges that SIGA's Drapkin stated in mid to late January 2006 that "we have a deal" and that all that remained for the parties to negotiate was boilerplate. Drapkin denies making that statement, but even if he did, I find for the reasons discussed *supra* that Drapkin focused more narrowly on what he considered to be the key economic components of a license with PharmAthene regarding ST–246. Drapkin credibly denied having the expertise to know what all the essential terms of such a license would be, and there is no evidence that anyone among those who worked with him in the negotiations with PharmAthene in early 2006 possessed that expertise. Indeed, Hruby had told Richman that certain important terms, such as the makeup and operation of the research and development committee, remained to be negotiated.

In *Asten,* the court ordered specific performance of a term sheet. In reaching that conclusion, the court held that the intent of the parties to split the proceeds was clear and "an unresolved administrative issue as to how to effect the split does not constitute the omission of a material term." FN114 The circumstances here are different. The issues SIGA and PharmAthene implicitly left for future negotiations involve far more than simply "unresolved administrative issues." In addition, PharmAthene has not proven that the parties believed they had reached agreement on all essential terms.

FN114. 1999 WL 803965, at *3.

***19** Finally, I also consider PharmAthene's reliance on *Parker–Hannifin* to be misplaced. There, the issue was whether a series of communications constituted a binding agreement to settle a patent infringement case and grant cross licenses. The court upheld the agreement even though it included only the following three essential terms: (1) that no party would support a challenge to the validity or enforceability of the patents; (2) that the parties would exchange mutual releases regarding the matter in litigation; and (3) that the parties would grant each other paid-up cross-licenses under the patents in suit covering all past, present, and future marketed products. The key question before the court in *Parker–Hannifin* was whether all of the terms the parties themselves regarded as important had been resolved. There, the court held they had been.

I cannot draw the same conclusion here. By the end of January 2006, the parties appear to have

agreed on the main economic terms of a license agreement to ST–246. The logical next step would have been to turn the LATS over to the parties' respective counsel to incorporate those key terms into a formal license agreement. PharmAthene, however, effectively preempted this next step by expressing its preference for a merger agreement rather than a license. In fact, PharmAthene tried to secure the best of both worlds by attempting to include in the merger term sheet a requirement that the parties attach to the anticipated merger agreement a full-blown, executed license agreement in case the merger was not completed. But, SIGA, through Drapkin, balked. He refused to incur the time and expense of fully negotiating a license agreement that might never be needed and instead agreed only to include in the Bridge Loan Agreement and, ultimately, the Merger Agreement, provisions that required SIGA to "negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in [the LATS]...." [FN115] These facts render the decision in *Parker–Hannifin* inapposite.

FN115. BLA § 2.3.

B. Did SIGA Breach an Obligation to Negotiate in Good Faith a License Agreement Containing Substantially the Same Economic Terms As The LATS [FN116]

FN116. SIGA contends that PharmAthene waived its claim for breach of a duty to negotiate in good faith under Count Five of its Amended Complaint by failing to discuss that claim in its Post–Trial Opening Brief. I find that argument unpersuasive. PharmAthene sufficiently preserved its claim under Count Five by making multiple references in its Post–Trial Opening Brief to SIGA's duty to negotiate in good faith under the Bridge Loan and Merger Agreements. Although PharmAthene focused most heavily on its claim that an actual licensing contract existed between it and SIGA, it argued in the alternative that "this court has held that ... even an 'agreement to agree' can be specifically enforced" and cited authority that "an agreement to negotiate in good faith may be binding under Delaware law ... and specific performance could, in theory, be an appropriate remedy for breach of such a provision." Pl.'s Post–T. Op. Br. 46 n. 47 (citing *Great–West Investors LP v. Thomas H. Lee P'rs, LP,* 2011 WL 284992, at *9 (Del. Ch. Jan. 14, 2011)).

1. Key facts

Although I have concluded that SIGA and PharmAthene did not enter into a definitive licensing agreement when they attached the LATS to both the Bridge Loan and Merger Agreements, these documents still are critical to determining the nature of the relationship between the parties. Section 2.3 of the Bridge Loan Agreement, executed on March 20, 2006, states that if the parties failed to merge, "SIGA and PharmAthene will negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the [LATS]...." The Merger Agreement, executed on June 8, 2006, contains essentially the same language. Even after these agreements were signed, however, it was uncertain whether the parties would be able to effect a merger or what ultimate form any joint undertaking between them would take.

***20** A number of promising events happened in the development of ST–246 between the time the Merger Agreement was signed on June 8, 2006 and its termination on September 30, 2006. For example, on June 9, NIAID awarded SIGA $5.4 million to develop the drug. In July, SIGA successfully completed the first planned clinical safety trial of ST–246. And, in late September, SIGA was awarded a $16.5 million NIH contract, which SIGA considered sufficient to support the entire remaining development of ST–246. With these events in mind, SIGA denied PharmAthene's request for an extension of the September 30, 2006 termination date

and advised Wright that it did not intend to pursue the merger further.

In the ensuing license negotiations, Drapkin played virtually no active role. Fasman and SIGA's outside counsel, Grayer and Coch, took the lead for SIGA. Although Drapkin was not directly involved, Fasman still described Drapkin as "a central participant," and said that he "was copied on every email [Fasman] sent out," "was a sounding board for [Fasman]," was one "of [the] members of SIGA's board kept aware of the terms of the LLC agreement .... [and he] certainly knew what was going on." FN117

FN117. T. Tr. 2224–26.

On October 12, 2006, Baumel sent Grayer PharmAthene's Proposed License Agreement, which incorporated the terms of the LATS in a more fully fleshed-out agreement. In an October 26 email to Coch, Olstein expressed PharmAthene's willingness to sign the Proposed License Agreement and suggested that the parties meet after SIGA sent a revised license agreement incorporating any proposed changes. Coch agreed to meet November 6, but stated that SIGA would not provide a revised draft in advance of that meeting. Coch also asserted that the Merger Agreement contemplated the need for "a robust discussion" regarding the license agreement.FN118

FN118. JTX 420.

At the November 6 meeting, Fasman proposed that the collaboration between the parties take a partnership structure, in the form of an LLC, rather than be a licensing transaction. SIGA claimed this was consistent with the "SIGA/PharmAthene partnership" title and intended purpose of the LATS. PharmAthene expressed surprise at this proposed structure because it understood the LATS to have envisioned a straight licensing deal in which PharmAthene would control the product within its own corporate structure and make certain payments back to SIGA. When pressed by PharmAthene, SIGA suggested that an upfront payment from PharmAthene of $40–45 million and a 50/50 profit split might be appropriate parameters for such a partnership or LLC transaction. These terms differed significantly from the original terms of the LATS, under which PharmAthene was scheduled to make an upfront payment of $6 million and SIGA was entitled to a profit split only as to U.S. government sales having a profit margin of 20% or more. Olstein responded that the parties were bound by the terms of the LATS but that, to avoid dispute, PharmAthene would consider economic terms somewhat different than those included in the LATS. PharmAthene's representatives also objected to Fasman's proposed LLC structure as inconsistent with the requirement that the parties negotiate a license agreement. The meeting ended with SIGA agreeing to put together a proposal in writing and PharmAthene undertaking to provide SIGA with the financial projections it had done for ST–246.

***21** On November 21, 2006, Coch sent SIGA's proposed 102–page Draft LLC Agreement to Baumel. Under this proposal, the parties jointly would own the prospective LLC and PharmAthene would make upfront, royalty, and milestone payments to SIGA. The LLC would hold an exclusive license under the patents to ST–246, but SIGA would receive a $300 million credit to its capital account to reflect its contribution of the patent rights and other research and development results to the entity.FN119 PharmAthene would receive only the residual value from sales of the drug if adequate funds were left after the upfront, milestone, and royalty payments had been made.

FN119. Draft LLC Agreement § 5.1(a).

Virtually every term of the Draft LLC Agreement was more favorable to SIGA than the corresponding provision in the LATS. For example, the upfront payment had increased from $6 million in the LATS to $100 million in the Draft LLC Agreement; the milestone payments had increased from $10 million to $235 million; the royalty rates to be paid to SIGA had increased from a range of

8%–12% to 18%–28%; and SIGA would be entitled to 50% of any remaining profit from the LLC, not just when net margin exceeded 20% on sales to the U.S. Government, as provided for in the LATS.

SIGA also revised the noneconomic terms of the proposed relationship to favor itself significantly. Whereas PharmAthene would have been the principal decisionmaker under the LATS, operational control shifted to SIGA under the Draft LLC Agreement. For example, SIGA unilaterally could resolve disputes, block distributions to PharmAthene, and terminate the LLC if certain events occurred, without even affording PharmAthene a right to cure. Yet, PharmAthene still would have been responsible to fund and guarantee all of the LLC's operations and obligations, despite having less operational control and being subject to much greater risk in terms of its potential payout.

The parties met again on November 28, 2006, to discuss the Draft LLC Agreement, but that meeting was not productive. Thereafter, Olstein sent a letter to Coch on November 30, repeating PharmAthene's position that, although it believed the parties were bound by the terms of the LATS, it still was willing to consider certain changes. In a reply sent on December 4, Coch stated that ST–246 had increased in value due to SIGA's "investment of time, money and effort," but did not suggest any revised terms.[FN120] Instead, SIGA offered to continue negotiations if PharmAthene agreed that the LATS was nonbinding. The parties exchanged a bit more correspondence, but neither side altered their proposals. On December 20, 2006, Pharmathene filed this action.

FN120. JTX 109.

2. Did SIGA act in bad faith by proposing the Draft LLC Agreement?

By executing the Bridge Loan Agreement and the Merger Agreement, both SIGA and PharmAthene became bound by the terms of those contracts. Accordingly, even if the parties were not obligated to execute a license agreement with terms identical to those in the LATS if the merger failed to close, the LATS still remained relevant to their relationship. This is because both Agreements expressly required the parties to "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" and both included the LATS as an exhibit.

***22** Under Delaware law, bad faith constitutes "not simply bad judgment or negligence, but rather ... the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will." [FN121] Thus, a party seeking to prove that another party has breached an obligation to negotiate in good faith must establish that the defendant's conduct was "motivated by a culpable mental state" or "driven by an improper purpose" that "rise[s] to a high level of egregiousness." [FN122]

FN121. *CNL–AB LLC v. E. Prop. Fund I SPE (MS Ref) LLC,* 2011 WL 353529, at *9 (Del. Ch. Jan. 28, 2011). Obliquity is defined as "deviation from moral rectitude or sound thinking." *Merriam–Webster's Collegiate Dictionary* 856 (11th ed.2004).

FN122. *Judge v. City of Rehoboth,* 1994 WL 198700, at *2 (Del. Ch. Apr. 29, 1994) ; *Amirsaleh v. Bd. of Trade of N.Y., Inc.,* 2009 WL 3756700, at *5 (Del. Ch. Nov. 9, 2009), *rev'd on other grounds,* 2011 WL 3585598 (Del.2011).

In considering the duty to negotiate in good faith, this Court has held that an attempt to condition future agreement on a previously "contested and compromised" point is "an unambiguous act of bad faith" where the other party performed in reliance on that compromise.[FN123] PharmAthene has made such a showing in this case. Specifically, the evidence proves that SIGA and PharmAthene contested and compromised the primary economic

terms of a license to ST–246 in the LATS, that PharmAthene acted in reliance on that compromise, and that SIGA disregarded those terms and attempted to negotiate a definitive license agreement that contained economic and other terms drastically different and significantly more favorable to SIGA than those in the LATS.[FN124] Accordingly, I find that SIGA acted in bad faith in relation to its duty to negotiate the terms of a licensing agreement in accordance with the terms of the LATS.

FN123. *See RGC Int'l Investors, LDC v. Greka Energy Corp.*, 2001 WL 984689, at *13 (Del. Ch. Aug. 22, 2001) [hereinafter *Greka*].

FN124. *See id.* at * 11, 14 (finding a breach of the duty to negotiate in good faith where the defendant made "a blatant attempt to force [the plaintiff] to give up a specifically negotiated provision in the Term Sheet—a provision that was already a settled item.") (citing *Abex Inc. v. Koll Real Estate Gp., Inc.*, 1994 WL 728827, at *37 (Del. Ch. Dec. 22, 1994)).

a. Did SIGA have a duty to negotiate a license agreement with economic terms similar to those in the LATS?

PharmAthene claims that the relevant clauses in the Bridge Loan and Merger Agreements required the parties to negotiate a license agreement with the same or similar economic terms as those in the LATS. According to PharmAthene, therefore, SIGA's proposed LLC structure, with economic terms that greatly differed from the terms in the LATS, could not have been proposed in good faith. SIGA, on the other hand, contends that the parties intended the LATS simply to provide a "jumping off point" by specifying the basic structure of a potential licensing agreement or partnership. Based on the facts surrounding the negotiation of the LATS and the subsequent dealings between the parties, I find that when the parties negotiated and compromised the terms of the LATS and the Bridge Loan and Merger Agreements, they mutually understood that any future license agreement would contain terms substantially similar to the LATS. Therefore, SIGA had a duty to negotiate a license agreement with PharmAthene having economic terms substantially similar to those agreed to in the LATS.

The evidence shows that the parties intended the LATS to provide more than just a basic framework for a future license agreement in which the amounts specified for various payments represented little more than mere placeholders. Throughout January 2006, SIGA and PharmAthene engaged in significant negotiations regarding the economic terms of the LATS. As a result, they arrived at specific economic terms for a potential license and incorporated them into the LATS. These terms not only included specific dollar amounts and royalty percentages to be paid by PharmAthene to SIGA, but also contained agreements as to the triggers, timing, and form of the payments to be made. For example, based on a request from SIGA, PharmAthene agreed that SIGA would be entitled to "receive 50% of any amounts by which net margin exceeds 20% on sales to the U.S. Federal Government." [FN125] The parties did not conclude a license agreement in early 2006 because PharmAthene elected to focus instead on merger discussions. Nevertheless, the 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.

FN125. LATS at 2; T. Tr. 156–57 (Richman).

***23** The extent to which the parties negotiated the economic terms of the LATS in January 2006 and the inclusion of the LATS in the Bridge Loan and Merger Agreements buttresses the conclusion that they intended those terms to be more than a mere "jumping off point" in later negotiations. SIGA's purported understanding of the LATS would render the January 2006 negotiations superfluous and the actual terms of the LATS virtually

meaningless. I find it unlikely, especially considering SIGA's immediate cash needs in late 2005 and early 2006, that the parties would have wasted time and money negotiating specific economic terms for the LATS without intending to give those terms significance in later negotiations. I find it equally unlikely that the parties would have incorporated the LATS into the subsequent Bridge Loan and Merger Agreements if they intended the LATS to provide only a rough and easily modified outline of the basic structure of the licensing agreement.

PharmAthene's performance under the Bridge Loan and Merger Agreements also supports my finding that it understood the parties to have intended the terms of the LATS to be important. The evidence shows that PharmAthene had no interest in serving as a bank to SIGA— *i.e.,* in loaning SIGA the $3 million it sought with the sole expectation of being repaid the principal and a negotiated rate of interest. In early 2006, PharmAthene did not have $3 million in freely available cash to make such a loan. Instead, PharmAthene itself had to raise capital to make that loan.[FN126] The record supports a finding that PharmAthene agreed to make the Bridge Loan as an investment in ST–246 which would enable the parties to explore fully the possibility of a merger while maintaining PharmAthene's right to pursue a license in accordance with the LATS. In that regard, I credit the testimony and documentary evidence PharmAthene adduced that it would not have loaned $3 million to SIGA without an assurance from SIGA that PharmAthene reasonably could expect to control ST–246 through either a merger or a license agreement in accordance with the terms of the LATS. The evidence shows that, as PharmAthene asserts, it made the Bridge Loan to assuage SIGA's immediate need for cash and to facilitate PharmAthene's preference for a merger, if possible. Hence, the parties focused their energies between February and June 2006 on negotiating the terms of the Bridge Loan Agreement, effectuating the Bridge Loan, and negotiating the Merger Agreement with the understanding that if no merger occurred, they would negotiate a fallback licensing agreement in accordance with the basic economics of the LATS.

> FN126. PharmAthene raised the requisite capital to extend the Bridge Loan from its original investors and from personal contributions by its senior management. T. Tr. 184 (Richman).

On or about September 30, 2006, SIGA terminated the Merger Agreement because the merger had not closed within the prescribed time period. As a result, the LATS-related clauses of the Bridge Loan and Merger Agreements became operative. For the reasons stated in this section, I find that those clauses required the parties to negotiate in good faith a license agreement with economic terms substantially similar to those contained in the LATS.

b. Were the economic terms proposed by SIGA in the later negotiations so different from the LATS as to constitute bad faith?

***24** In expectation that it eventually would control ST–246 through either a merger or license agreement in accordance with the LATS, PharmAthene gave SIGA a $3 million bridge loan and provided support for developing and commercializing ST–246 during the period from approximately March to September 2006. At least partially as a result of PharmAthene's loan and support, SIGA was able to move forward with development of the drug and, by late summer 2006, had received strong indications that ST–246 would be enormously successful.

At the same time, SIGA began experiencing "seller's remorse" for having given up control of what was looking more and more like a multi-billion dollar drug. Indeed, by the end of September 2006, SIGA had secured independent government funding to support the remaining development of ST–246, which it believed made PharmAthene's continued involvement unnecessary. Therefore, when PharmAthene asked for an extension of the merger deadline, SIGA declined. Against that background, PharmAthene turned its sights to negotiat-

ing a license agreement in accordance with the terms of the LATS as required under the Bridge Loan and Merger Agreements.

As discussed *supra,* SIGA was required to negotiate a license agreement with PharmAthene that included economic terms substantially similar to the economic terms of the LATS. The terms proposed under the Draft LLC Agreement, however, were not similar to the LATS, nor were they intended to be. Even though SIGA's projections of the value of the drug had increased by, at most, three to four times, it increased the amount of the upfront and milestone payments that would be required under the Draft LLC Agreement in comparison to the LATS by more than twelve and twenty-three times, respectively.[FN127] The Draft LLC Agreement also more than doubled the royalty rates provided for in the LATS and called for SIGA to receive 50% of *all* residual profits. In addition, SIGA would receive most of its payments first, and PharmAthene could only claim its share from any residual value remaining after SIGA was paid.

> FN127. The initial projections for the market value of ST–246 in December 2005 were $1–1.26 billion. JTX 166. In November 2006, SIGA valued the drug between $3–5.6 billion. JTX 515.

I find that SIGA's Draft LLC Agreement reflects a complete disregard for the economic terms of the LATS. SIGA effectively admitted as much by claiming that the positive developments that had occurred during the summer and early fall of 2006 justified its position. SIGA's argument, however, ignores the negotiating history of the LATS, the parties' intent in incorporating it into the Bridge Loan and Merger Agreements, and PharmAthene's performance under the Bridge Loan Agreement. PharmAthene made the Bridge Loan to SIGA with the understanding that the terms of the LATS represented a baseline of what it would receive in exchange for the loan and its support of the development of the drug. When PharmAthene extended the loan, M & F, SIGA's largest investor, had refused to supply SIGA with any further funding and it was uncertain whether SIGA could continue to develop ST–246 without PharmAthene's help. Moreover, at the time of the Bridge Loan, it was still highly speculative whether ST–246 would prove valuable. In agreeing to make that loan, PharmAthene made clear to SIGA that it was doing so in anticipation of eventually controlling the drug through either a merger or a license agreement with terms similar to the LATS. PharmAthene then performed its part of the Bridge Loan Agreement and put its own money at risk. In addition, the evidence shows that PharmAthene's funding played a major role in allowing the drug to move forward.[FN128] In these circumstances, by trying substantially to renegotiate the economics of a license agreement in light of facts that occurred *after* PharmAthene had performed its obligations and undertook an economic risk that SIGA and M & F intentionally avoided, SIGA acted in bad faith.

> FN128. The record shows that by spring 2006, SIGA was quickly running out of money. *See* T. Tr. 1396–97 (Konatich); JTX 214 ("If we could have saved the $1.3 million wasted on [former SIGA executives] we could have gone forward on our own.") (Konatich); JTX 205 ("At this point the terrifying thing is if the deal falls through and we are back to no [money], no CEO and a pissed off Donny .") (Hruby). In fact, SIGA was able to use approximately $600,000 from the Bridge Loan to begin human safety trials in May 2006. JTX 203, 210.

***25** With the benefit of hindsight, it appears M & F and SIGA's board made a terrible business decision in opting to offer a major stake in ST–246 for a relatively small capital infusion. The evidence is unmistakable, however, that Drapkin and SIGA knew what they were doing and went ahead anyway. M & F, through Drapkin, categorically refused to invest more money in SIGA in late 2005 and early 2006. The emails of SIGA insiders Konatich

and Hruby clearly reflect the extent to which SIGA was squeezed by that decision and its need for cash. They also demonstrate that SIGA knew just how much control of ST–246 it was offering to cede to PharmAthene to get the cash it needed to continue its development in 2006. Nevertheless, SIGA took the cash.

By the end of September 2006, the tables had turned. It then appeared that ST–246 would be a fantastic success and that SIGA could obtain all the capital it might need in the future from sources independent of PharmAthene. Predictably, Hruby quickly claimed that SIGA deserved all the credit for ST–246's good fortune and determined that SIGA had no need for PharmAthene whatsoever.

The only brake on Hruby's willingness to cut PharmAthene out would have been if someone familiar with the earlier negotiations fairly and objectively reminded SIGA of what it already had agreed to with PharmAthene. The likely candidate for that role was Drapkin, but he abdicated that responsibility and resorted, instead, to a selective and biased memory of the parties' negotiations. Drapkin apparently took no active role in the post-September 2006 licensing negotiations other than to offer his counterfactual recollection that the LATS were nothing but a "jumping off point." [FN129] Beyond that, Drapkin, and SIGA for that matter, essentially left the negotiations of the license agreement to those who either had no involvement in the previous negotiations and agreements, most notably Fasman, or acting in their own self-interest, such as Hruby, were more than happy to disregard the economic importance of the LATS.

> FN129. Drapkin's trial testimony may have been truthful, but it brought to mind the advice the Rockman gave to the boy Oblio in Nilsson's "The Point": "You see what you want to see ... You hear what you want to hear...." Nilsson, *The Point* (RCA Records 1971) (Storybook libretto) (ellipses in original). That is, Drapkin was so focused on obtaining from PharmAthene the money SIGA needed to continue pursuing the development of a potentially lucrative drug that he paid little attention to what PharmAthene wanted in return. As a result, Drapkin actually may have had as superficial an understanding of the situation as he claimed or simply may have forgotten the substance of the parties' communications. In any event, I find Drapkin's testimony to be largely subjective and otherwise unreliable, especially as it pertains to his belittlement of the LATS as a mere "jumping off point." In that regard, I note that because contractual interpretation is an objective exercise, a party's subjective, though truthful, understanding is largely irrelevant. 1 *Williston on Contracts* § 3:5 (4th ed.) ("[T]he law of contracts is concerned with the parties' objective intent, rather than their hidden, secret or subjective intent." (citing *Leonard v. Univ. of Del.*, 204 F.Supp.2d 784, 787 (D.Del.2002))).

In many respects, the facts of this case are similar to those presented in *Greka*.[FN130] In *Greka*, the acquirer of a target oil company negotiated a term sheet with the target's preferred shareholders, RGC, in anticipation of its acquisition of the target. Under the provisions of a preferred stock agreement with the target, RGC possessed a mandatory redemption option that, if exercised, effectively would have killed any prospect for the proposed merger. To avoid that situation, the acquirer negotiated a term sheet with RGC under which RGC would abstain from exercising its redemption option. An important aspect of the term sheet from RGC's point of view was that it still could engage in short-selling of the acquirer's stock after the acquisition. Although the acquirer and RGC did not finalize their agreement before the shareholder vote, RGC allowed the merger to go forward in reliance on its expectation that, after the closing, the parties would work out an agreement in accordance with the provisions of the term sheet. In relevant part, the term sheet stated that the parties mutually

agreed "to negotiate in good faith the contemplated transaction...." [FN131] Yet, after the merger closed, the acquirer attempted to renegotiate the short selling provision of the term sheet to prohibit any short selling by RGC. As a result, the parties failed to reach an agreement and RGC sued, claiming breach of the acquirer's contractual obligation to negotiate in good faith and promissory estoppel.

FN130. 2001 WL 984689 (Del. Ch. Aug. 22, 2001).

FN131. *Greka,* 2001 WL 984689, at *7.

***26** In deciding whether the acquirer in *Greka* had acted in bad faith in attempting to renegotiate a term previously negotiated and agreed to in the term sheet, the court found that, regardless of whether the term sheet itself was an enforceable contract, neither party "could in good faith insist on specific terms that directly contradicted a specific provision found in the Term Sheet." [FN132] Because the acquirer had insisted on a term that contradicted a specific provision of the term sheet, the court held the acquirer liable for a bad faith breach of the duty to negotiate in good faith that resulted in the failure to reach a final agreement.[FN133]

FN132. *Id.* at *14. The term sheet in *Greka* related to a secured Note Exchange, the closing of which was dependent on the parties reaching agreement on "definitive documentation," completion of the contemplated merger between the acquirer and the target, and cancellation of certain preferred shares. The term sheet also expressly "acknowledged [the parties'] mutual agreement to the above terms [of the Term Sheet] and their intention to negotiate in good faith the contemplated transaction in an expedited manner." *Id.* at *7 (emphasis omitted). Based on the circumstances surrounding the inclusion of the LATS in the Bridge Loan and Merger Agreements, I do not perceive any material difference between the quoted language in the term sheet in *Greka* and the term sheet at issue here.

FN133. *Id.* at * 14.

Similarly to *Greka,* the parties here reached a negotiated agreement in the LATS on specific economic terms that they intended would serve as the basis for a final license agreement in the event the parties failed to conclude the merger. Several of these terms were the subject of active negotiation by the parties. For example, the LATS, as agreed to, called for a total upfront payment by PharmAthene of $6 million, with $2 million being paid in "cash upfront," $2.5 million in cash as a " 'Deferred License Fee[ ] payable 12 months from [the] date of the agreement," and $1.5 million "post financing > $15 [million]." [FN134] In the negotiations that led up to the LATS, however, PharmAthene initially proposed that the upfront payments be structured as $2 million "cash upfront," $2 million in PharmAthene stock, and $1 million "post financing > $15 [million]," for a total of $5 million. [FN135] Internally, SIGA's Konatich advised Hruby that he had a problem with the $2 million up front, because "[he] would like to have at least $3 [million] in cash which would permit the completion of the build out and get us through 2006 without too much trouble...." [FN136] Furthermore, Drapkin encouraged Konatich to "push hard on cash and guarantees." [FN137] When PharmAthene continued to propose the use of stock for part of the upfront payment, SIGA also expressed a strong preference for cash. Ultimately, in the final version of the LATS, PharmAthene agreed to increase the total amount of the upfront licensing fee from $5 to $6 million and to provide the entire amount in cash. [FN138]

FN134. LATS at 1.

FN135. JTX 425.

FN136. JTX 171.

FN137. JTX 175.

FN138. JTX 9.

While the economic terms proposed in the Draft LLC Agreement may not have "directly contradict[ed]" the LATS in the same way that the prohibition on short selling did in *Greka,* they differed dramatically from the LATS in favor of SIGA. Furthermore, I have concluded that SIGA agreed to give the economic terms of the LATS substantial weight in the later licensing negotiations. By its own admission, however, SIGA did not believe those terms to be controlling or even deserving of considerable weight, relegating them instead to being a mere "jumping off point." In fact, SIGA virtually disregarded the economic terms of the LATS other than using them as a skeletal framework for the *types* of payments that would be made without giving any meaningful weight to the dollar amounts or percentages it had negotiated earlier.[FN139] The Draft LLC Agreement, therefore, bore no resemblance to the economic terms of the LATS and, not surprisingly, resulted in the parties failing to reach agreement on a license agreement. Therefore, I find that SIGA breached its duty to negotiate a license agreement in good faith in accordance with the terms of the LATS.[FN140]

FN139. In its pre-trial brief, SIGA relied heavily on *Transamerican S.S. Corp. v. Murphy,* 1989 WL 12181 (Del. Ch. Feb. 14, 1989), in arguing that SIGA was not bound by the terms of the LATS because the parties did not intend the LATS to be binding. *Transamerican* stands for the principle that a party cannot be bound to a contract where it has expressly conditioned its consent on the satisfaction of a condition precedent which was not fulfilled. *Id.* at * 1. Because SIGA did not condition its obligation to negotiate in good faith on such a condition precedent, the holding in *Transamerican* is inapposite. In this case, it is true that the LATS does not constitute a binding license agreement. The relevant inquiry, however, is not whether the LATS created a binding contract, but whether the terms negotiated in the LATS were entitled to deference in later negotiations, a point which *Transamerican* does not address.

FN140. Furthermore, I note that the overall *structure,* as much as the specific terms, of the Draft LLC Agreement contributes to my finding that SIGA breached its obligations under the Bridge Loan and Merger Agreements to negotiate a license agreement for ST–246 in good faith. Under Section 5.1(a), SIGA's only capital contribution to the LLC would be "a worldwide, exclusive license" for ST–246. Thus, regardless of any agreement on the Draft LLC Agreement, the parties still would need to agree on an independent license agreement between SIGA and the newly formed LLC. Though, in the abstract, a license agreement could have taken the form of an LLC, *see* JTX 489, Edwards Report, ¶ 68, PharmAthene apparently never anticipated such an arrangement. T. Tr. 214–15 (Richman). Moreover, in so far as the title of the LATS calls for a "partnership," PharmAthene's expert Edwards testified credibly that the word "partnership" "is used rather loosely" in the biopharmaceutical industry. T. Tr. 982–83. In fact, of twenty-three SEC-filed biopharmaceutical agreements referred to as "partnerships" found by Edwards, only two formed legal partnerships; the remainder constituted licenses, asset purchases, or other similar transactions. T. Tr. 982–83. Accordingly, SIGA's proposed LLC structure and its one-sided terms support my finding that SIGA did not satisfy its obligation under the Bridge Loan and Merger Agreements to negotiate in good faith.

C. Is SIGA Entitled to Relief Under the Doctrine of Promissory Estoppel?

***27** Alternatively, PharmAthene claims it is entitled to relief under a theory of promissory estoppel. Under Delaware law, a plaintiff asserting a claim for promissory estoppel must show by clear and convincing evidence that: (1) a promise was made; (2) the promisor reasonably expected to induce action or forbearance by the promisee; (3) the promisee reasonably relied on the promise and took action to its detriment; and (4) the promise binds the parties because injustice can be avoided only by its enforcement.[FN141] Promissory estoppel requires a real promise, not just mere expressions of expectation, opinion, or assumption.[FN142] The promise also must be reasonably definite and certain.[FN143]

FN141. *Territory of U.S. V.I. v. Goldman, Sachs & Co.*, 937 A.2d 760, 804 (Del. Ch.2007) (citing *Chrysler Corp. (Del.) v. Chaplake Hldgs.*, 822 A.2d 1024, 1032 (Del.2003)), *aff'd*, 956 A.2d 32 (Del.2008) (TABLE).

FN142. *Metro. Convoy Corp. v. Chrysler Corp.*, 208 A.2d 519, 521 (Del.1965).

FN143. *Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1233 (Del. Ch.2000).

As discussed *supra*, SIGA promised PharmAthene that, at the very least, it could expect to receive control over ST–246 through a license agreement with economic terms similar to the LATS. SIGA negotiated the LATS with PharmAthene in expectation of receiving funding for the development of ST–246, and PharmAthene provided both financial and operational assistance to SIGA in reliance on the LATS and its incorporation into the Bridge Loan and Merger Agreements. SIGA counters by arguing that promissory estoppel cannot apply because the "loan was repaid and [PharmAthene] never provided it with any meaningful management, expertise, technical know-how or capital." [FN144] I disagree, because PharmAthene made the Bridge Loan and assumed the risks thereunder and provided the operational support it did in reliance on SIGA's promise to afford it a good faith opportunity to obtain control of ST–246, and not solely in exchange for interest on a secured loan. Therefore, justice would not be done by treating PharmAthene as a bank to SIGA, something it specifically sought to avoid.[FN145] Accordingly, I find that PharmAthene has shown the existence of the elements of promissory estoppel.

FN144. Def.'s Post–T. Ans. Br. 56. PharmAthene disputes the allegation that the expertise and services it provided were meaningless. I find that the expertise and services were valuable, but probably not to the full extent PharmAthene claims.

FN145. *See Chaplake Hldgs., Ltd.*, 822 A.2d at 1034 ("The prevention of injustice is the 'fundamental idea' underlying the doctrine of promissory estoppel.").

D. Was SIGA Unjustly Enriched by the Assistance Provided by PharmAthene to Develop ST–246?

PharmAthene's final claim that SIGA has been unjustly enriched is based largely on the same facts underlying its promissory estoppel claim. That is, in addition to providing the Bridge Loan, PharmAthene alleges that it contributed regulatory, quality assurance, quality control, clinical, manufacturing, government affairs, and business development assistance that helped SIGA develop and now control a product potentially worth billions of dollars. PharmAthene contends that it provided this assistance based on its understanding that it ultimately would control the product, that SIGA knew of PharmAthene's expectation, and that SIGA did nothing to prevent or dissuade PharmAthene from providing such assistance. SIGA, by contrast, contends that any assistance it received from PharmAthene was *de minimis* and officious, thereby precluding a finding of unjust enrichment.

Unjust enrichment is the "unjust retention of a benefit to the loss of another, or the retention of money ... of another against the fundamental prin-

ciples of justice or equity...." [FN146] To succeed on a claim for unjust enrichment, a party must show: (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and the impoverishment; (4) the absence of a justification; and (5) the absence of a remedy at law. [FN147] "A person who officiously confers a benefit upon another is not entitled to restitution," [FN148] however, absent having first afforded the recipient an opportunity to reject the benefit.[FN149] Moreover, unjust enrichment involves a threshold inquiry: "whether a contract already governs the relevant relationship between the parties." [FN150] If so, "then the contract remains 'the measure of [the] plaintiff's right.' " [FN151]

FN146. *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2009 WL 513756, at *5 (Del. Ch. Feb. 27, 2009) (quoting *Schock v. Nash*, 732 A.2d 217, 232 (Del.1999)), *aff'd*, 977 A.2d 899 (Del.2009) (TABLE)) [hereinafter *MetCap II*].

FN147. *Jackson Nat'l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 393 (Del. Ch.1999).

FN148. Restatement (First) of Restitution § 112 cmt. a (1937); *see also id.* § 112 ("A person who without mistake, coercion, or request has unconditionally conferred a benefit upon another is not entitled to restitution...."); *MetCap II*, 2009 WL 513756, at *10 ("Delaware has expressly adopted § 112 [of the Restatement (First) of Restitution].").

FN149. *See MetCap II*, 2009 WL 513756, at *11 n. 59 (Section 112 reflects the principle that, without affording the recipient an opportunity to reject the benefit, the person who conferred it has no equitable claim.); *cf.* Restatement (First) of Restitution § 112 cmt. c (distinguishing as outside the scope of § 112 a purported agent's entitlement to compensation for services officiously rendered and accepted by the purported principal under the agency law doctrine of ratification).

FN150. *BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp.*, 2009 WL 264088, at *7 (Del. Ch. Feb. 3, 2009).

FN151. *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *5 (Del. Ch. May 16, 2007) (quoting *Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 942 (Del.1979)) [hereinafter *MetCap I*].

***28** To the extent PharmAthene's claim for unjust enrichment relies on its provision of capital in the form of the Bridge Loan, the Bridge Loan Agreement alone provides the measure of PharmAthene's rights. Once the merger had been terminated, the Bridge Loan Agreement required SIGA to "negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the [LATS]." [FN152] As discussed *supra*, SIGA breached that duty and thereby breached that contract. Therefore, PharmAthene must look to the Bridge Loan Agreement to enforce its rights in that regard, and it cannot pursue an independent claim for unjust enrichment based on SIGA's use of the capital it provided under that Agreement.[FN153]

FN152. BLA § 2.3.

FN153. *See, e.g., Bakerman v. Sidney Frank Importing Co.*, 2006 WL 3927242, at *18 (Del. Ch. Oct. 16, 2006) ("When the complaint alleges an express, enforceable contract that controls the parties' relationship, however, a claim for unjust enrichment will be dismissed."); *Albert v. Alex Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at * 11 (Del. Ch. Aug. 26, 2005) (dismissing an unjust enrichment claim "when the existence of a contractual relationship [was] not controverted").

PharmAthene, however, has not predicated its claim for unjust enrichment solely on the monetary capital it provided. It also relies on its provision of operational support to SIGA. Because PharmAthene has demonstrated that SIGA was enriched, to some degree, by that support, the first element of unjust enrichment is satisfied. Second, PharmAthene was impoverished by its extension of the operational support it provided. Although PharmAthene has not presented evidence to demonstrate a dollar value of that assistance, I am convinced that its employees expended considerable time that they would have spent on other PharmAthene matters were it not for their expectation that PharmAthene would control ST–246. Third, SIGA's enrichment—*i.e.*, its receipt of free development assistance—directly resulted from PharmAthene's provision of it.

The fourth element of unjust enrichment is the absence of justification. This element "usually entails some type of wrongdoing or mistake at the time of the transfer," [FN154] such that a defendant "could not retain any benefit resulting from the disputed transaction 'justifiably' or in accordance with 'the fundamental principles of justice or equity and good conscience.' " [FN155]

FN154. *Territory of U.S. V.I. v. Goldman, Sachs & Co.*, 937 A.2d 760, 796 n. 161 (Del. Ch.2007), *aff'd*, 956 A.2d 32 (Del.2008) (TABLE).

FN155. *Jackson Nat'l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 394 (Del. Ch.1999).

Here, SIGA contends that any enrichment was not unjust and that the services rendered by PharmAthene were officious because (i) Grayer "reminded [Baumel] on several occasions that the entities needed to be completely separate legal entities" [FN156] until the merger closed and (ii) Hruby asked several PharmAthene representatives, including Wright, for greater autonomy with respect to SIGA's clinical development of ST–246.[FN157] I reject this argument. First, Grayer's testimony that he reminded Baumel to respect the legal independence of SIGA until after the merger closed was given at trial in response to direct examination concerning preparation of SIGA's proxy statement, not concerning PharmAthene's involvement in ST–246. [FN158] Second, although Wright recalled the conversation with Hruby and even characterized it as an "argument," [FN159] Hruby's own account of it was: "I became uncomfortable with the *amount* of control that PharmAthene executives were trying to exert over ST–246 ... and, ultimately, that was relayed to Mr. Wright." [FN160] A request that PharmAthene be less involved in clinical development of ST–246 is not an outright rejection of the assistance PharmAthene provided. Indeed, it implies acceptance of at least some part of it. Lastly, PharmAthene provided ongoing assistance to SIGA for over six months, from March to September 2006. Throughout that period, SIGA knew that PharmAthene was providing its assistance only because it reasonably anticipated that it soon would control ST–246, and SIGA had every opportunity to refuse to accept the assistance. Under these circumstances, where SIGA knowingly accepted the benefits of an ongoing, personal services relationship for an extended period of time without rejecting those services, I find that PharmAthene did not confer a benefit officiously. Accordingly, SIGA lacks justification for retaining the benefits PharmAthene conferred.

FN156. T. Tr. 1532 (Grayer).

FN157. T. Tr. 1588–89 (Hruby).

FN158. T. Tr. 1530–32.

FN159. T. Tr. 100.

FN160. T. Tr. 1588–89 (emphasis added). SIGA attempts to characterize Wright's recollection of the argument as a "demand" by Hruby that PharmAthene, quoting the transcript, "back away from SIGA's development program until a merger was

closed." Def.'s Post–T. Ans. Br. 15. I consider that allegation to be overstated, however, and accord it no weight.

***29** Fifth and finally, PharmAthene must not have an adequate remedy at law. "This element turns on the adequacy of the legal remedy as a practical matter." [FN161] Although PharmAthene theoretically could pursue a remedy at law for reimbursement of the portion of its employees' salaries attributable to their time spent working on ST–246, [FN162] such a remedy would not adequately redress the harm alleged here. Rather, fundamental principles of justice or equity arguably might require an accounting to disgorge the increase in value of ST–246 attributable to PharmAthene's assistance. [FN163] Conceptually, therefore, the fifth element of unjust enrichment might be satisfied. In this case, however, PharmAthene did not introduce evidence of such harm other than in connection with the overall relief it seeks based on its claims for SIGA's breach of its contractual obligation to negotiate in good faith and promissory estoppel. A further finding of unjust enrichment would not lead to different or additional relief. Thus, I conclude that PharmAthene's unjust enrichment claim effectively is subsumed in its breach of contract and promissory estoppel claims.[FN164]

FN161. *Reserves Dev. LLC v. Severn Savs. Bank, FSB,* 2007 WL 4054231, at * 12 (Del. Ch. Nov. 9, 2007), *aff'd,* 961 A.2d 521 (Del.2008).

FN162. *See* Restatement (Third) of Restitution & Unjust Enrichment § 49(3) (2011) ("Enrichment from the receipt of nonreturnable benefits may be measured by ... the cost to the claimant of conferring the benefit....").

FN163. *See id.* § 51(4) ("[T]he unjust enrichment of a conscious wrongdoer ... is the net profit attributable to the underlying wrong.").

FN164. *See supra* note 153 and accompanying text.

For these reasons, I need not discuss the unjust enrichment claim further.

E. Remedies

As discussed above, I have found SIGA liable (1) for breach of its obligations under Section 2.3 of the Bridge Loan Agreement and Section 12.3 of the Merger Agreement to "negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the [LATS]" and (2) under the doctrine of promissory estoppel. I now address an appropriate remedy for those wrongs.

1. Remedy for breach of contract and promissory estoppel

As a threshold matter, the remedies for breach of contract and under the doctrine of promissory estoppel can, and often do, overlap. As applied in Delaware, promissory estoppel serves fundamentally to prevent injustice and, in so doing, may entitle a party to recovery of its expectation interest. [FN165] Therefore, I address the appropriate remedy for both the breach of contract and promissory estoppel claims together in the following subparts.

FN165. *Chrysler Corp. v. Quimby,* 144 A.2d 123, 133–34 (Del.), *aff'd on reh'g,* 144 A.2d 885 (Del.1958); *see also Greka,* 2001 WL 984689, at *15–16 (determining that expectation damages properly remedied both the breach of contract and promissory estoppel claims).

a. Parties' contentions

PharmAthene first requests an order of specific performance compelling SIGA to perform its contractual obligations. In the alternative, PharmAthene asks for an award of expectation damages based on the expert reports and testimony of Jeffrey Baliban, who considered various, alternative sets of assumptions to determine a specific dollar amount of damages. Lastly, PharmAthene asks me to con-

sider awarding "an equitable payment stream on sales [of ST–246] that would be *economically equivalent* to the lump sum damages amounts determined by Baliban." [FN166] That is, because no sales of ST–246 have taken place yet, a lump sum damages award might be premature or too speculative at this time or even place PharmAthene in a better position than if the parties had agreed to a license. Elsewhere, PharmAthene described that form of relief as an on-going profit participation in future sales, if any, of ST–246.[FN167]

FN166. Pl.'s Post–T. Op. Br. 65.

FN167. PharmAthene's description of its so-called "equitable payment stream" is not entirely consistent. By requesting a payment stream "economically equivalent to the lump sum damages amount determined by Baliban," PharmAthene seems to request, in effect, an annuity with a net present value equal to Baliban's estimate of its expectation damages. Nevertheless, PharmAthene argues that its requested relief would mirror SIGA's return on sales of ST–246 and, thus, "mitigate any uncertainties around the future sales of ST–246...." *Id.* at 66. Based on this latter argument, I understand PharmAthene's use of the phrase "equitable payment stream" to mean an on-going profit participation in future sales, if any, of ST–246.

***30** Most of PharmAthene's arguments, however, and virtually all of its expert evidence regarding remedies are predicated on the theory that the LATS constituted an enforceable license agreement and that SIGA's breach of the LATS warrants specific performance, expectation damages, or an equitable payment stream. As discussed *supra,* I have found that the LATS does not constitute an enforceable license agreement. Rather, liability arises from SIGA's breach of its express obligations under the Bridge Loan and Merger Agreements to negotiate in good faith. And, while breach of a duty to negotiate in good faith warrants a remedy, that remedy need not implement (via specific performance) or compensate for (via monetary damages) the aborted license.[FN168] In this context, PharmAthene's request for specific performance must be construed as a request for an order compelling SIGA to negotiate in good faith a license agreement for ST–246 and not for an order specifically enforcing the LATS. Similarly, I construe PharmAthene's alternative request for monetary damages as a request for the damages PharmAthene suffered as a result of SIGA's failure to negotiate a license agreement in good faith and not for the damages it suffered because it did not obtain a license strictly conforming to the LATS. Because PharmAthene's briefs and expert evidence focus mostly on the damages that would have been due if a license in strict conformance with the LATS had been formed, however, they provide only limited guidance in determining the precise bounds of an appropriate remedy.

FN168. *J.W. Childs Equity P'rs, L.P. v. Paragon Steakhouse Rests., Inc.,* 1998 WL 812405, at *3 (Del. Ch. Nov. 6, 1998).

For its part, SIGA contends that none of PharmAthene's requested remedies are appropriate. As to specific performance, SIGA argues that a "court-ordered collaboration between SIGA and PharmAthene risks the creation of a dysfunctional and unproductive development team for ST–246" given the parties' current relationship and that judicial oversight of an order to negotiate in good faith would be impractical.[FN169] With respect to expectation damages, SIGA argues that lost profits are too speculative to award. In addition, SIGA cites *Goodstein Construction Corp. v. City of New York,* [FN170] a case applying New York law, for the proposition that reliance damages, not expectation damages, are the only remedy available to PharmAthene for its breach-of-good-faith claim.[FN171] Lastly, SIGA objects to PharmAthene's request for a running payment stream on the following grounds: (i) a payment stream is no different than a "reasonable royalty" under the patent laws, which

remedy I rejected before trial; [FN172] (ii) the structure of a payment stream— *i.e.,* funds running from SIGA, as effective licensee, to PharmAthene, as effective licensor—reverses the deal structure contemplated by the LATS; (iii) the dollar amounts requested rely on flawed assumptions in Baliban's expert reports; (iv) PharmAthene cites no authority recognizing the availability of such a remedy where, as SIGA contends is the case here, expectation damages are speculative; and (v) such a remedy fails to account for the remaining risk involved in further developing and marketing ST–246 that PharmAthene would have had to assume under a license agreement.

FN169. Def.'s Post–T. Ans. Br. 49 & n. 36. Like PharmAthene, SIGA briefed its arguments as if the failure to implement the LATS itself, rather than the failure to negotiate in good faith, were the relevant wrong. For this reason, SIGA's other arguments against specific performance are generally irrelevant to the issue now before me.

FN170. 80 N.Y.2d 366 (N.Y.1992).

FN171. The Bridge Loan Agreement is governed by New York law, while the Merger Agreement is subject to Delaware Law. *See* BLA § 7.11; Merger Agreement § 13.5.

FN172. Def.'s Post–T. Ans. Br. 69 (citing *SIGA II,* 2010 WL 4813553, at * 13).

b. Relevant legal principles

1. Specific performance

***31** Specific performance is an equitable remedy "firmly committed to the sound discretion of the Court" [FN173] and, therefore, dependent on the circumstances of each case. At a minimum, "[a] party seeking specific performance must show by clear and convincing evidence that: (1) a valid contract exists; (2) the party is ready, willing, and able to perform; and (3) the balance of the equities tips in favor of the party seeking performance." [FN174]

FN173. *Szambelak v. Tsipouras,* 2007 WL 4179315, at *4 (Del. Ch. Nov. 19, 2007) (citing *Safe Harbor Fishing Club v. Safe Harbor Realty Co.,* 107 A.2d 635, 638 (Del. Ch.1953)).

FN174. *Corkscrew Min. Ventures, Ltd. v. Preferred Real Estate Invs ., Inc.,* 2011 WL 704470, at *6 (Del. Ch. Feb. 28, 2011) (citing *Osborn v. Kemp,* 991 A.2d 1153, 1158 (Del.2010)).

Under Delaware law, specific performance is likely a permissible remedy for breach of an agreement to negotiate in good faith, but it is equally likely to engender significant practical problems. [FN175] As Chancellor Allen put it in *VS & A Communications Partners, L.P. v. Palmer Broadcasting Ltd. Partnership,*[FN176] "courts of equity could not be expected to enter such orders except where any violation of the order (*i.e.,* any bad faith negotiation) would be easily detected." Vice Chancellor Noble's recent decision in *Great–West Investors* [FN177] provides an illustrative example of this concern. There, the Court noted that a failure to negotiate in good faith due to an informational imbalance could be remedied by an order requiring the informed party to provide the other with the missing information, but that "it might be difficult to win an order enforcing other aspects of the duty to negotiate in good faith ." [FN178] These doubts as to the appropriateness of specific relief for a breach of a duty to negotiate in good faith derive from the black-letter principle that courts should not order specific performance where the qualitative character of the performance would force the court into an onerous enforcement or supervisory role.[FN179]

FN175. *Great–West Investors, LP v. Thomas H. Lee P'rs, L.P.,* 2011 WL 284992, at *9 (Del. Ch. Jan. 14, 2011).

FN176. 1992 WL 167333, at *4 (Del. Ch. July 14, 1992).

FN177. 2011 WL 284992, at * 10.

FN178. *Id.*

FN179. *See* Restatement (Second) of Contracts § 366 & cmt. a (1981) ("Granting specific performance may impose on the court heavy burdens of enforcement or supervision. Difficult questions may be raised as to the quality of the performance rendered under the decree.... Specific relief will not be granted if these burdens are disproportionate to the advantages to be gained from enforcement and the harm to be suffered from its denial.").

2. Expectation damages

The "standard remedy" in Delaware, as elsewhere, "for breach of contract is based upon the reasonable expectations of the parties *ex ante.* This principle of expectation damages is measured by the amount of money that would put the promisee in the same position as if the promisor had performed the contract." [FN180] As I stated in *SIGA II,* "a plaintiff can only recover those damages which can be proven with reasonable certainty. Moreover, no recovery can be had for loss of profits which are determined to be uncertain, contingent, conjectural or speculative." [FN181] Nevertheless, damages are not "speculative" merely because they are difficult to calculate. Rather than mathematical precision, "the law requires only that there be a sufficient evidentiary basis for making a fair and reasonable estimate of damages...." [FN182]

FN180. *Duncan v. Theratx, Inc.,* 775 A.2d 1019, 1022 (Del.2001) (citing Restatement (Second) of Contracts § 347 cmt. a).

FN181. 2010 WL 4813553, at * 11 (internal quotation marks and citations omitted).

FN182. *Vianix Del. LLC v. Nuance Commc'ns, Inc.,* 2010 WL 3221898, at *6 (Del. Ch. Aug. 13, 2010) (citing *Henne v. Balick,* 146 A.2d 394, 396 (Del.1958)).

This case presents a particularly vexing question as to the difference between damages that are speculative and those that merely lack mathematical precision. On the one hand, even a consummated license agreement between PharmAthene and SIGA in accordance with the LATS still would subject PharmAthene to the possibility that it might not profit at all for a host of reasons. For example, ST–246 might never receive FDA approval, there are no guaranteed purchasers of ST–246, and research delays or problems in animal trials might prevent ST–246 from reaching a viable market in a timely fashion. Because under even a fully-consummated license agreement there would be a plausible chance that PharmAthene would make no profit, PharmAthene's claimed expectation damages could be considered, in a literal sense, to be merely speculative.

***32** For these reasons, SIGA contends that this Court should rule similarly to the New York Court of Appeals in *Goodstein.*[FN183] There, the City of New York and a real estate developer entered into several letters of intent for the purchase of land from the City. Although the letters of intent established the sales price, they conditioned the sale on a more formal Land Disposition Agreement ("LDA"), which would subject the development to various conditions and covenants. Moreover, the City agreed in the letters of intent to negotiate the LDA exclusively with the developer. Critically, any mutually agreeable LDA negotiated by the City and the developer would not become effective until it received independent approval by various administrative agencies. When the City failed to negotiate with the developer and thereby breached its implied duty of good faith and fair dealing under the letters of intent, the developer sought to recover expectation damages in the form of its lost profits on the development.[FN184]

FN183. 80 N.Y.2d 366 (1992).

FN184. *Id.* at 368–70.

The Court of Appeals ruled that "both the law and logic preclude[d]" recovery of the developer's expectation damages.[FN185] Emphasizing that the obligation breached was merely to negotiate an LDA and that even a final LDA could be denied by the independent agencies, the court concluded that an award of expectation damages "would, in effect, be transforming an agreement to negotiate for a contract into the contract itself." [FN186] Because the court could not determine "what agreement would have been reached, there [wa]s no way to measure the lost expectation." [FN187] Therefore, the court limited the relief available to the developer to its reliance interests.

FN185. *Id.* at 373.

FN186. *Id.*

FN187. *Id.* at 374 (quoting 1 Farnsworth, *Contracts* § 3.26a).

Fairly read, however, *Goodstein* does not preclude expectation damages whenever a contract contains some business risk, nor does it necessarily establish a rule more stringent than Delaware's "sufficient evidentiary basis" requirement. Indeed, according to Professor Farnsworth, the general rule against recovery of uncertain damages has been relaxed to permit recovery of the lost business opportunity of an aleatory contract, *i.e.,* a contract dependent on an uncertain contingency, so long as the value of the "lost chance" is fairly measurable. [FN188] Although Delaware courts understandably have refused to take such a principle to its extreme, [FN189] they have awarded expectation damages fairly approximating the value of a lost business opportunity. Some of these principles were involved in the court's award of damages in *Greka* for breach of a party's duty to negotiate a transaction in good faith in the context of a nonbinding terms sheet. [FN190]

FN188. 3 Farnsworth, *Contracts* § 12.15, at 276–78 (2004); *see also United States v. Locke,* 283 F.2d 521, 524–25 (Ct.Cl.1960) ("We are here concerned with the value of a chance for obtaining business and profits .... [and] where it is fairly measurable by calculable odds and by evidence bearing specifically on the probabilities[,] the court should be allowed to value that lost opportunity.").

FN189. *See Callahan v. Rafail,* 2001 WL 283012, at *8 (Del.Super.Mar.16, 2001) (holding expected winnings of an injured race horse too speculative to award as expectation damages).

FN190. *Greka,* 2001 WL 984689, at *5, 7.

Upon Greka's failure to negotiate in good faith the long-form agreement, the court awarded expectation damages based primarily on the economic terms already agreed to and contained in the term sheet. That is, the court awarded expectation damages to RGC, the prospective note holder, of 120% of the preferred shares' stated value plus all accrued and unpaid interest, dividends, and registration payments as provided for in the term sheet.[FN191] In determining the amount of damages, the court stressed that it was guided "not by speculation, but by how the parties themselves agreed to value Greka's obligations to RGC as embodied in the Term Sheet." [FN192] Based on the specificity of the term sheet and Greka's breach of its obligation to negotiate in good faith, the court awarded RGC's expectation damages "in the amount equal to what RGC should have received if the Note Exchange had been consummated." [FN193]

FN191. *Id.* at * 16. RGC did not seek a damages award based, for example, on the possibility that it might have exercised its conversion right for Greka shares or invested the note proceeds in another profitable enterprise. *Id.* at * 16 n. 88.

FN192. *Id.* at *16.

FN193. *Id.*

***33** Viewed in their respective factual contexts, the outcomes in *Goodstein* and *Greka* are not as disparate as they initially might seem. Both cases involved expectancy interests arising from breaches of agreements to negotiate ultimate transactions, of which the precise terms were unknown. The damages awarded in *Goodstein* excluded the lost profits on that contemplated, but not precisely defined, transaction, and those awarded in *Greka* were based primarily on what the parties had agreed upon before the breach. Moreover, in *Greka,* the court found that most of the principal, open terms "were or would have been resolved" during good faith negotiations for the long-form agreement.[FN194] In *Goodstein,* by contrast, negotiations for a binding LDA were subject to significantly greater uncertainty because "the required approval [for any LDA to become binding] contemplated a discretionary legislative action that was political in nature and not subject to judicial review." [FN195] Thus, a critical distinction between these two cases was whether the contingencies remaining after the parties had agreed to agree were such that the value of the lost opportunity was fairly measurable. In *Goodstein,* the court appears to have concluded that there was no reasonable basis upon which to conclude that the LDA would have received the required discretionary approval by an independent agency. In *Greka,* the court found that, had the defendant negotiated in good faith, the parties likely would have reached an agreement, and that the value of that agreement could be responsibly estimated.

> FN194. *Id.* at * 11. Greka considered five points "absolutely critical" to a final agreement. "[S]ubstantial progress" was made on three of those five, and a fourth "did not seem likely to terminate the negotiation." *Id.* at *8.
>
> FN195. *Goodstein,* 80 N.Y.2d at 372–73 (internal citations omitted).

Applying these precedents to the facts before me, I conclude that I cannot award PharmAthene the present value of its estimated lost profits on a license agreement that (1) would have contained the risk of receiving no profits and (2) was never consummated, because such an award would be speculative. Nevertheless, it is possible that, in an appropriate case, permissible expectation damages for breach of an agreement to negotiate in good faith may include the net present value of whatever the parties had, or in good faith demonstrably would have, agreed to exchange at the time that the breach occurred.

3. Equitable payment stream

Admittedly, there is little precedent to aid this Court in fashioning an appropriate remedy for the breach SIGA committed. In *Venture Associates Corp. v. Zenith Data Systems Corp.,*[FN196] then Chief Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit grappled with the damages implications of a breach of an express obligation to negotiate in good faith. Specifically, the court wrote:

> FN196. 96 F.3d 275 (7th Cir.1996).

> Damages for breach of an agreement to negotiate may be, although they are unlikely to be, the same as the damages for breach of the final contract that the parties would have signed had it not been for the defendant's bad faith. If, quite apart from any bad faith, the negotiations would have broken down, the party led on by the other party's bad faith to persist in futile negotiations can recover only his reliance damages—the expenses he incurred by being misled, in violation of the parties' agreement to negotiate in good faith, into continuing to negotiate futilely. But if the plaintiff can prove that had it not been for the defendant's bad faith the parties would have made a final contract, then the loss of the benefit of the contract is a consequence of the defendant's bad faith, and, provided that it is a foreseeable consequence, the defendant is liable for that loss—liable, that is, for the plaintiff's consequential damages. The difficulty, which may well be insuperable, is that since by hypothesis the parties had not agreed on *any* of the terms of their

contract, it may be impossible to determine what those terms would have been and hence what profit the victim of bad faith would have had. But this goes to the practicality of the remedy, not the principle of it. Bad faith is deliberate misconduct, whereas many breaches of "final" contracts are involuntary—liability for breach of contract being, in general, strict liability. It would be a paradox to place a lower ceiling on damages for bad faith than on damages for a perfectly innocent breach, though a paradox that the practicalities of proof may require the courts in many or even all cases to accept.[FN197]

FN197. *Id.* at 278–79 (internal citations omitted).

***34** These concepts must be considered in the context of the maxim of equity that "[e]quity will not suffer a wrong without a remedy." [FN198]

FN198. *See* 1 Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* viii (2010) [hereinafter "Wolfe & Pittenger"].

To that end, the Court of Chancery will award "such relief as justice and good conscience may require" [FN199] and "has broad discretion to form an appropriate remedy for a particular wrong." [FN200] One such equitable remedy this Court has utilized in appropriate circumstances is a constructive trust, which

FN199. *Lichens Co. v. Standard Commercial Tobacco Co.,* 40 A.2d 447, 452 (Del. Ch.1944).

FN200. *Whittington v. Dragon Gp. LLC,* 2011 WL 1457455, at *15 (Del. Ch. Apr. 15, 2011).

compel[s] a person who wrongfully has obtained or asserted title to property, by virtue of fraud or unfair and unconscionable conduct, to hold such property in trust for the person by whom in equity it should be owned and enjoyed and to convey it to that rightful owner.... As a remedial measure, the constructive trust resembles the enforcement of a quasi-contractual obligation in that both remedies seek to prevent unjust enrichment in the absence of an express agreement. [FN201]

FN201. Wolfe & Pittenger § 12.07[b], at 12–88 to 12–89; *see also Adams v. Jankouskas,* 452 A.2d 148, 152 (Del.1982) (holding that a constructive trust may be imposed to remedy a defendant's enrichment by fraudulent, unfair, or unconscionable conduct to the plaintiff where the defendant also owed some duty to the plaintiff).

The design of a constructive trust is not "to effectuate the presumed intent of the parties, but to redress a wrong," and, in this way, "[i]t is an equitable remedy of great flexibility and generality...." [FN202] Although Delaware law requires that the corpus of a constructive trust be specific property, identifiable proceeds of specific property can satisfy that requirement.[FN203]

FN202. *Hogg v. Walker,* 622 A.2d 648, 652 (Del.1993).

FN203. *Id.*

Another equitable remedy, similar in purpose and operation to a constructive trust, is an equitable lien. Such a lien may be appropriate "to recognize a plaintiff's equitable ownership in only part of [a] specific property." [FN204] If one were to consider applying either or both concepts of a constructive trust and an equitable lien in the circumstances of this case, the specific property might be the patent and other intellectual property rights in ST–246, and the proceeds from that property might in some way be subject to an equitable lien.

FN204. Wolfe & Pittenger § 12.07[d], at 12–103.

c. Analysis of the relief sought

1. Specific performance

PharmAthene's primary claim for relief seeks specific performance. As to the elements for specific performance, there is no dispute that at least two valid contracts requiring negotiation based on the LATS exist. SIGA's obligation to negotiate in good faith a license agreement for ST–246 in accordance with the terms in the LATS was made both explicit and plain in Section 2.3 of the Bridge Loan Agreement and Section 12.3 of the Merger Agreement. Both of these agreements were executed by PharmAthene and SIGA and otherwise constitute valid contracts. Additionally, PharmAthene has shown that it is "ready, willing, and able to perform" its obligation to negotiate under those contracts.[FN205] Indeed, this is not a situation where two parties simply failed to come to terms on a prospective transaction. Rather, it is one where SIGA, in bad faith, torpedoed the negotiations that it had agreed to conduct. Finally, but for PharmAthene's reasonable belief that, in its worst case scenario, it could control ST–246 by negotiating a license for it in accordance with the terms of the LATS, it would not have provided SIGA with the financing SIGA needed in early 2006. Under these facts, the balance of equities favors PharmAthene.

> FN205. *See Osborn v. Kemp,* 991 A.2d 1153, 1158 (Del.2010). After termination of the Merger Agreement, PharmAthene prepared and transmitted to SIGA on October 12, 2006 the Proposed License Agreement, which incorporated the terms of the LATS, and offered to meet to discuss the draft. JTX 46. As Wright testified at trial, PharmAthene was prepared to sign that Proposed License Agreement as written if SIGA had accepted it, T. Tr. 54, but also was prepared to enter into a license agreement on terms that "varied to some extent from the LATS." T. Tr. 57. The evidence also shows that PharmAthene *remains* ready, willing, and able to perform an agreement consistent with the LATS. SIGA questions PharmAthene's ability to complete the development and commercialization of ST–246 as provided for by the LATS. Def.'s Post–T. Ans. Br. 45. The relevant wrong is not breach of the LATS, however, but breach of the obligation to negotiate faithfully a license agreement in accordance with the LATS. I find that PharmAthene has shown its ability to perform the latter obligation.

***35** In this case, an order of specific performance would require SIGA to resume licensing negotiations with PharmAthene and to do so faithfully. But faithful negotiation is an inherently qualitative performance and an order requiring it implicates the very concerns Chancellor Allen and Vice Chancellor Noble articulated in *VS & A Communications* and *Great–West Investors,* respectively. The positions SIGA took when it proposed the Draft LLC Agreement in late 2006 were so far removed from the terms of the LATS that they amounted to bad faith. The gulf between those LLC terms and the LATS is immense. That gulf and the long and contentious history of this dispute indicate that the parties would approach any mandated negotiations from extremely different perspectives. In such circumstances, it would be difficult to distinguish a violation of a specific performance order (*i.e.,* a bad faith negotiation), on the one hand, from faithful, but hard-fought negotiations, on the other. In other words, enforcement of the order would force me to assume an ongoing and onerous supervisory role, which black-letter principles caution courts to avoid.[FN206] Based on these considerations and the fact that the propriety of ordering specific performance is firmly committed to the sound discretion of the Court,[FN207] I deny PharmAthene's request for an order compelling SIGA to engage in faithful negotiations of a license agreement for ST–246 in accordance with the LATS.

> FN206. *See* Restatement (Second) of Contracts § 366 & cmt. a (1981).
>
> FN207. *Szambelak v. Tsipouras,* 2007 WL

4179315, at *4 (Del. Ch. Nov. 19, 2007).

2. Expectation damages

In the alternative, PharmAthene seeks an award of its expectation damages for breach of SIGA's obligation to negotiate in good faith. In that respect, this case more closely resembles *Greka* than *Goodstein.* As in *Greka,* the parties memorialized the basic terms of a transaction in a term sheet, the LATS, and expressly agreed in the Bridge Loan and Merger Agreements that they would negotiate in good faith a final transaction in accordance with those terms. Based on the evidence presented here, I find that the parties also recognized that the negotiations probably would introduce new terms and lead to some adjustment of terms expressly embodied in the LATS, while other terms in the LATS were almost certain to remain. Unlike *Greka,* however, PharmAthene expected to be compensated not by any return payments from SIGA, but by obtaining "a worldwide exclusive license under the [broadly defined] Patents, Know–How and Materials to use, develop, make, have made, sell, export and import Products in Field" (which included ST–246), including the right to grant sublicenses.[FN208]

FN208. LATS at 1.

In resisting an award of expectation damages for breach of its obligation to negotiate in good faith or as a remedy under the doctrine of promissory estoppel, SIGA effectively argues that, in terms of a remedy, this Court has only two choices. First, it could award expectation damages in the form of a specific sum of money, which SIGA further contends would be unduly speculative and, therefore, impermissible. Alternatively, the Court could award PharmAthene its "reliance" damages or interest, which SIGA asserts is limited to what PharmAthene actually spent or gave up in connection with the Bridge Loan and Merger Agreements. In 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.

***36** Although the facts of *Greka* differ in some important respects from this case, the court's discussion of damages provides helpful guidance here. First, in *Greka,* then Vice Chancellor, now Chancellor Strine held that the "doctrine of promissory estoppel as applied in Delaware does not require an award of damages to be limited to a party's reliance interest." [FN209] Citing *Chrysler Corp. v. Quimby,* [FN210] the court noted that the promissory estoppel cases embody the fundamental idea of the prevention of injustice and, therefore, can support damages that, among other possibilities, "secure[ ] for the promisee the expectancy or its value." [FN211] Thus, Chancellor Strine concluded that, "If the facts of a case so merit, a plaintiff may recover[ ] its expectation interest from a recovery of damages in a promissory estoppel case." [FN212]

FN209. 2001 WL 984689, at * 15.

FN210. 144 A.2d 123 (Del.), *aff'd on reh'g,* 144 A.2d 885 (Del.1958).

FN211. *Greka,* 2001 WL 984689, at *15.

FN212. *Id.* (footnote omitted).

At the outset, I note that one important difference between *Greka* and this case is that, in *Greka,* RGC had not asked the court to grant it "an indeterminable estimation of future profits." [FN213] Here, SIGA contends that is exactly what PharmAthene seeks in its claim for damages of anywhere from $400 million to more than $1 billion, depending on the scenario and assumptions used. Before analyzing that aspect of SIGA's argument, however, I review briefly the particulars of PharmAthene's damages claim.

FN213. *Id.* at *16.

In addition to its damages expert, Baliban, PharmAthene relied on two other experts regarding damages: an FDA expert, Dr. Carl Peck, and a biotechnology licensing expert, Marc Edwards. In estimating PharmAthene's expectation damages, Baliban conducted a discounted future earnings

(DFE) analysis, forecasting over a ten-year period the earnings PharmAthene would have received under a license for ST–246 consistent with the terms of the LATS. To do so, Baliban: (1) forecasted future revenues by multiplying estimated sales quantities by an estimated price per treatment; (2) deducted from those revenues estimated costs of goods sold (COGS), selling, general, and administration (SG & A) expenses, and continuing R & D expenses to determine future earnings; (3) allocated those future earnings to either PharmAthene or SIGA in accordance with the milestone, royalty, and profit-sharing terms of the LATS; (4) applied a multiplier reflecting the probability of successful development of ST–246, which PharmAthene's FDA expert Peck determined in an independent report, to PharmAthene's share of future earnings; and (5) discounted PharmAthene's expected future earnings to their net present value as of December 2006, the date SIGA's breach occurred.[FN214] Moreover, Baliban independently performed his DFE analysis on two different bases. Basis I employed data inputs derived from information the parties knew as of December 2006, and Basis II updated those inputs to account for new information the parties had learned as of a date shortly before trial.[FN215]

FN214. Baliban Report ¶ 41.

FN215. *Id.* ¶ 6. In both scenarios, Baliban discounted expected returns to their present value as of December 2006. *Id.* ¶ 7. Thus, both Bases purport to model PharmAthene's damages at the time of breach, but Basis II attempts to improve the accuracy of the model by incorporating more current information, to the extent possible. *See SIGA II,* 2010 WL 4813553, at *13 ("[E]xpectation damages are to be measured as of the date of the breach.").

Under the Basis I model, Baliban estimated PharmAthene's expectation damages as $1.07 billion.[FN216] Baliban ran the Basis II model twice, first using information available as of November 2009 and then again as of April 2010, after incorporating more recent information from correspondence between SIGA and BARDA regarding the RFP.[FN217] According to the 2009 Basis II model, PharmAthene's expectation damages were $1.017 billion,[FN218] while the 2010 Basis II model indicated those damages would be approximately $402 million.[FN219]

FN216. Baliban Report ¶ 67 & Ex. 6A.

FN217. JTX 159, Baliban Suppl. Report, ¶ 3. On February 23, 2010, SIGA responded to BARDA's RFP with additional information concerning the quantity and timing of deliveries to the U.S. government, the price of those deliveries, the inclusion of milestone and performance-based payments providing additional revenue, and estimates of COGS, SG & A expenses, and future R & D spending. *Id. passim.*

FN218. Baliban Report ¶ 69 & Ex. 6B

FN219. Baliban Suppl. Report ¶ 5 & tbl. 2.

***37** Having carefully reviewed the testimony and reports of PharmAthene's experts, including especially Baliban, I find that PharmAthene's claims for expectation damages in the form of a specific sum of money representing the present value of the future profits it would have received absent SIGA's breach is speculative and too uncertain, contingent, and conjectural.[FN220] Therefore, I decline to award such relief. The evidence adduced at trial proved that numerous uncertainties exist regarding the marketability of ST–246 and that it remains possible that it will not generate any profits at all. These uncertainties relate to, among other things, regulatory matters, questions of demand, price, competition, and the parties' marketing competency. Moreover, when it comes to expert evidence, reliability is of the essence.[FN221] In appraisal proceedings, for example, this Court often accepts discounted cash flow (DCF) calculations prepared by experts, but also "repeatedly has recognized that the

reliability of a DCF analysis depends on the reliability of the inputs to the model." [FN222] Similarly with breach of contract claims to recover lost profits, "[r]eliability of the lost profits projections is essential in making a determination of lost profits." [FN223] The huge fluctuations in Baliban's estimated damages (in the hundreds of millions of dollars) based on changes to a few variables in his analysis confirm that it would be unduly speculative to attempt to fix a specific sum of money as representative of PharmAthene's expectation damages.[FN224]

FN220. *See SIGA II,* 2010 WL 4813553, at * 11.

FN221. *See Daubert v. Merrell Dow Pharms. Inc.,* 509 U.S. 579, 590 (1993) ("[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."); *M.G. Bancorporation, Inc. v. Le Beau,* 737 A.2d 513, 522 (Del.1999) (adopting *Daubert* as the standard for assessing admissibility of expert evidence in Delaware).

FN222. *In re U.S. Cellular Operating Co.,* 2005 WL 43994, at * 10 (Del. Ch. Jan. 6, 2005) (citing *Dobler v. Montgomery Cellular Hldg. Co.,* 2004 WL 2271592, at *9 (Del. Ch. Oct. 4, 2004) and *Dofi & Co. v. Travelocity.com, Inc.,* 2004 WL 1152338, at *5 (Del. Ch. May 20, 2004)).

FN223. *Pfizer Inc. v. Advanced Monobloc Corp.,* 1999 WL 743927, at *6 (Del.Super.Sept.2, 1999).

FN224. The disparity of outcomes between, on the one hand, the Basis I and 2009 Basis II models and, on the other hand, the 2010 Basis II model highlights the inherently speculative nature of Baliban's damages calculations. With the benefit of slightly more current information, PharmAthene's estimated damages diminished by over $600 million, or more than 50%. Moreover, the 2010 Basis II model still contains a number of uncertainties. For example, as of April 2010, no final contract with BARDA yet existed. Even assuming consummation of the BARDA RFP negotiation, the model contains assumptions that could influence the bottom line in either direction. For example, BARDA offered to commit to purchase 1.7 million treatments from SIGA over three years with options to purchase another 17 million treatments over the following seven years. Baliban Suppl. Report ¶¶ 7–9. Baliban assumed BARDA would exercise all of these options, which clearly could overstate estimated revenues. Conversely, Baliban assumed certain improvements to ST–246's shelf-life that would enable BARDA to purchase fewer treatments. Had Baliban not assumed such improvements, the model would have generated a damages calculation of over $700 million. T. Tr. 767–78 (Baliban). SIGA's damages expert Ugone identified additional examples of the sensitivity within Baliban's 2010 Basis II model. For example, were sales to commence one year later than assumed in the model, the ultimate damages amount would decrease by over $90 million, a decrease of over 20%. T. Tr. 2524–25. Similarly, a 1% increase to the discount rate Baliban employed would cause the net present value of PharmAthene's estimated damages to decrease by $33 million, a decrease of over 8%. T. Tr. 2538.

Nevertheless, the court's reasoning in *Greka* supports giving careful consideration to PharmAthene's request for expectation damages in the form of a future payment stream or share of the profits that SIGA ultimately can expect to reap from its wrongful usurpation of ST–246 and related intellec-

tual property. After noting that RGC was not seeking an "indeterminable estimation of future profits," the court in *Greka* stated:

> Rather, RGC asks only to be awarded exactly *what* Greka agreed to give RGC in the written Term Sheet (money and security), exactly *when* Greka should have given it, and at the rate (120% of principal) that Greka agreed to pay it. In determining the amount of damages to award, the Court is guided not by speculation, but by how the parties themselves agreed to value Greka's obligations to RGC as embodied in the Term Sheet. Put another way, the best measure of what RGC gave up (*i.e.*, its lost reliance interest) is the price that these two aggressive adversaries put on it after arms-length bargaining. Based on the facts of this case, where Greka breached its obligation to negotiate in good faith *and* RGC reasonably relied on the promises made by Greka and thereby took action to its detriment, the court may award damages and security in the amount equal to what RGC should have received if the Note Exchange had been consummated.[FN225]

FN225. *Id.* (footnotes and internal quotation marks omitted).

I find a similar approach appropriate in this case.

3. Equitable lien on anticipated proceeds

***38** Turning to PharmAthene's request for expectation damages in the form of an equitable payment stream that would share at least some of the characteristics of a constructive trust or equitable lien, I find that SIGA did owe a duty to PharmAthene and that SIGA has been enriched by its bad faith breach of that obligation.[FN226] SIGA had a duty under the Bridge Loan and Merger Agreements to negotiate in good faith. SIGA's breach of that obligation, for all of the reasons discussed *supra,* was inequitable to PharmAthene. In addition, SIGA has been enriched by its inequitable conduct. SIGA continues to possess, for example, exclusive rights in the patents to ST–246 and related products. Those rights are valuable in and of themselves.

FN226. *Cf. Adams v. Jankouskas,* 452 A.2d at 152 (stating the standard for imposition of a constructive trust to remedy inequitable conduct).

I also find that, but for SIGA's bad faith negotiations, the parties likely would have reached agreement on a transaction generally in accordance with the LATS. PharmAthene was willing to agree to a license agreement for ST–246 on terms that varied "to some extent" from the LATS.[FN227] I find that one such variation PharmAthene would have accepted is the use of a 50/50 profit split.[FN228] SIGA countered PharmAthene's Proposed License Agreement, however, with the Draft LLC Agreement, which included economic terms that bore no meaningful resemblance to the LATS.[FN229] Although PharmAthene objected to the Draft LLC Agreement on that basis, it expressed a willingness to consider increasing the upfront payments to SIGA prescribed by the LATS and to introduce a broader profit sharing component. Without making concessions of its own, SIGA ultimately responded that it would terminate negotiations unless PharmAthene stopped "conditioning" negotiations on strict adherence to the LATS. Had SIGA engaged in good faith negotiations, I am convinced that a license agreement between PharmAthene and SIGA for ST–246 would have resulted in terms no less favorable to PharmAthene than the 50/50 profit split it already had mentioned and an increase in the upfront and milestone payments from a total of $16 million, as specified in the LATS to something in the range of $40 million.

FN227. T. Tr. 57 (Wright).

FN228. It is not entirely clear from the record whether PharmAthene definitively offered an across-the-board 50/50 profit split in lieu of royalty payments. Richman testified that, after receiving SIGA's Draft

LLC Agreement, PharmAthene conveyed to SIGA that PharmAthene was "willing to *consider* " a 50/50 profit split. T. Tr. 228 (emphasis added). Subsequent correspondence between PharmAthene's counsel Olstein and SIGA's counsel Coch, however, presents a more ambiguous account. On the one hand, Olstein wrote on November 30, 2006, "we are even willing to consider some amendments to [the LATS]; for instance instead of the royalty and excess margin payments presently payable, there could be a 50–50 split of the profits...." JTX 270 at 2. That language suggests an objective offer on PharmAthene's part to an across-the-board profit split. Consistent with that view, PharmAthene's Pre–Trial Brief criticizes Coch's reply to the November 30 letter for, among other things, not "respond[ing] to Olstein's *offer* of a 50/50 profit split in any way." Pl.'s Pre–T. Br. 23 (emphasis added). Similarly, PharmAthene's Pre–Trial Brief criticized SIGA's "failure to acknowledge PharmAthene's major concession in *proposing* a 50/50 profit split...." *Id.* at 36 (emphasis added). On the other hand, Olstein later wrote on December 6, 2006, "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]." JTX 124. In addition, PharmAthene's Pre- and Post–Trial Briefs frequently stated that PharmAthene was only "willing to consider" a 50/50 profit split. *See* Pl.'s Pre–T. Br. 18, 21, 23; Pl.'s Post–T. Op. Br. 34–35. Having considered all the evidence, I find (1) that PharmAthene would have agreed to a license agreement containing a pure 50/50 profit split in lieu of royalty payments had SIGA negotiated in good faith, and (2) that PharmAthene, in fact, did make such an offer.

FN229. At the November 6, 2006 meeting between the parties and before SIGA proposed its Draft LLC Agreement, SIGA's representatives stated they would be seeking upfront license fees in the range of $40 to $45 million. T. Tr.2084–85 (Fasman).

Thus, SIGA retained its exclusive interest in ST–246 only as a result of its bad faith conduct toward PharmAthene, and SIGA is enriched thereby. Under these facts, expectation damages in the form of an equitable payment stream akin to a constructive trust or an equitable lien on a share of the proceeds from ST–246 deserves serious consideration.

Applying the equitable principles and remedies discussed *supra* to the facts of this case, I conclude that an appropriate remedy would be to afford PharmAthene a stream of future payments if and when commercial sales of ST–246 commence, after accounting for certain marginal expenses. Such a remedy would operate somewhat similarly to an award of a constructive trust or of an equitable lien on a partial interest in the proceeds derived from the patents and related intellectual property for ST–246. A remedy of this sort would comport with the Court's authority to provide relief "as justice and good conscience may require" [FN230] and the requirement to avoid speculative damages.

FN230. *Lichens Co. v. Standard Commercial Tobacco Co.*, 40 A.2d 447, 452 (Del. Ch.1944).

***39** Viewing PharmAthene's request for an equitable payment stream as akin to a request for imposition of an equitable lien addresses most of SIGA's remaining objections to that request. First, unlike a "reasonable royalty" under the patent laws, the equitable remedy of an equitable lien is independent of and does not rely on federal patent law doctrine. Second, relief akin to an equitable lien would not require reducing expectation damages to specific monetary amounts representing a present value and, therefore, would not involve reliance on the more speculative aspects of Baliban's expert reports. Instead, the Court would need to be satisfied

that the proportionate interest in proceeds from ST–246 and any adjustment for upfront expenses that it orders are supported by the evidence. Third, because the remedy would be prospective in this case— *i.e.,* a share in the future proceeds from ST–246, if any—PharmAthene would not be relieved of the risk that ST–246 generates no profits. Furthermore, the prescribed share can be tailored to account for payments PharmAthene would have had to make under a negotiated agreement consistent with the LATS. In this way, a payment stream similar to an equitable lien would not relieve PharmAthene disproportionately of risks or costs it otherwise would have had to bear under a formal licensing agreement.

SIGA further objects to a remedy in the form of a payment stream on the ground that it would reverse the structure of the transaction contemplated by the LATS. Under the LATS, PharmAthene would control the ST–246 patents and product and any royalty payments would be due from PharmAthene, as licensee, to SIGA. By contrast, under a payment stream remedy as suggested by PharmAthene, SIGA would hold the patent, but it would have to make payments to PharmAthene. The structure is reversed, but SIGA's wrongdoing necessitates that. Absent SIGA's failure to negotiate a license agreement in good faith, PharmAthene would have controlled the ST–246 patents and product. Yet, due to its misconduct, SIGA currently controls those items and will in the future.[FN231] In these circumstances, as in the case of an equitable lien, it is appropriate to recognize PharmAthene's legitimate claim to share in the proceeds of ST–246.

> FN231. For the reasons previously stated, PharmAthene is not entitled to a form of relief that would interfere with SIGA's control of ST–246 or the patents related to it. PharmAthene could have proceeded from the LATS to conclude a definitive license agreement with SIGA in early 2006 or it could have held fast to its original suggestion in February 2006 that a complete license agreement be incorporated as an exhibit to the merger term sheet and later related agreements. In fact, PharmAthene did neither nor did they otherwise secure the right to insist that the terms of the LATS be strictly adhered to in an ultimate license agreement. As a result, I have concluded that PharmAthene is not entitled to a license to ST–246 and the patents related to it. Rather, the relief I am ordering will afford PharmAthene an interest in the *proceeds* from the sale of ST–246 products and, conceivably, the related patents. In this sense, SIGA may be correct that the structure of the transaction contemplated by the LATS has been reversed, but it has no equitable basis to complain about such a reversal. Under the LATS, PharmAthene would have enjoyed a significant degree of control over ST–246 and the related patents. Instead, that control, and the benefit likely to flow from it, will remain with SIGA.

4. Specific terms of the equitable payment stream ordered

In deciding the precise bounds of the payment stream to award, the Court's task is, first, to derive a responsible estimate of "what [PharmAthene] should have received if the [licensing agreement] had been consummated" [FN232] (*i.e.,* to determine PharmAthene's expectancy interest) and, second, to provide a remedy that reasonably compensates PharmAthene for that lost expectancy. In providing a reasonably compensatory remedy, I find guidance in the primary purpose of a constructive trust: to redress a wrong rather than "to effectuate the presumed intent of the parties...." [FN233] In other words, I need not award a payment stream on proceeds from ST–246 that mirrors the terms of the LATS. My focus, therefore, is on what cashflows, with reasonable certainty, PharmAthene would have received had good faith negotiations yielded a definitive license agreement and on how best to compensate PharmAthene for the loss of those

cashflows.

FN232. *Greka,* 2001 WL 984689, at *16 (Del. Ch. Aug. 22, 2001).

FN233. *Hogg v. Walker,* 622 A.2d 648, 652 (Del.1993).

***40** At all stages of negotiation between PharmAthene and SIGA, a license agreement for ST–246 comprised, at a minimum, (1) some combination of upfront, deferred, and milestone payments from PharmAthene to SIGA [FN234] and (2) some combination of revenue sharing in the form of royalty payments on net sales and 50/50 profit splits on all or part of certain net margins.[FN235] Under the LATS or its own Proposed License Agreement, PharmAthene would have expected those cashflows to be as follows: (1) aggregate guaranteed payments to SIGA of $16 million and (2) royalty payments of no more than 12% on net sales as well as profit sharing of 50% on the excess of net margins above 20% on sales to the U.S. government.[FN236]

FN234. LATS at 1–2 (providing for License Fees, Deferred License Fees, and Milestones of, in the aggregate, $16 million); Proposed License Agreement §§ 4.1–4 (providing for Upfront Payment, Development Milestone Payments, Deferred Payments, and Additional Payment of, in the aggregate, $16 million); T. Tr.2084–85 (Fasman) (testifying that SIGA suggested an upfront license fee in the range of $40–45 million in November 2006); Draft LLC Agreement §§ 5.1(b) & 6.5(b) (providing for Initial Distribution, prefunding of the [LLC's] initial budget, and Milestone Payments of, in the aggregate, $335 million).

FN235. LATS at 2 (providing for incremental royalties of 8%, 10%, and 12% on yearly net sales of Patented Products of less than or equal to $250 million, greater than $250 million, and greater than $1 billion, respectively, as well as "50% of any amounts by which net margin exceeds 20% on sales to the U.S. Federal Government"); Proposed License Agreement §§ 4.4(b) & 5.1 (providing for royalties as specified by the LATS); Draft LLC Agreement §§ 6.1, 6.5(c) & Schedule 1 (providing for royalties of 18%, 22%, 25%, and 28% on net sales of less than or equal to $300 million, greater than $300 million, greater than $600 million, and greater than $1 billion, respectively, as well as equal distributions to each member thereafter).

Although the LATS refers to "net sales," that term seems roughly to equate to gross sales revenues. *See* Proposed License Agreement § 1.4 (" 'Net Sales' means, with respect to any Product licensed to PharmAthene or any of its Sublicensees, the amount received on account of sales, or other disposition, of Product by PharmAthene or its sublicensees."); Draft LLC Agreement § 1.1 (defining "Net Sales" as "[w]ith respect to any Product, the amount received on account of sales, or other disposition, of Product by the [LLC], PharmAthene or either of their sublicensees. All calculations of Net Sales shall be based on bona fide arms' length transactions and not on any bundled, loss-leading or other blended or artificial selling or transfer price, and shall be in accordance with GAAP.").

FN236. Both when it negotiated the LATS in January 2006 and when it attempted to negotiate a definitive license agreement after termination of the Merger Agreement in late 2006, PharmAthene believed the market potential for ST–246 exceeded $1 billion and, thus, expected the highest marginal royalty percentage (*i.e.,* 12%) to ap-

> ply. Additionally, PharmAthene's damages expert, Baliban, concluded that margins on sales to the U.S. government probably would have exceeded 20%, which would have triggered the 50/50 profit split on the excess margins. *See* Baliban Report ¶ 63 & Ex. 6A (estimating positive values for "SIGA's Profit Split on U.S. Margin" commencing in 2008, the same year that sales were assumed to begin).

At least one critical assumption had changed, however, between the time the parties negotiated the LATS in January 2006 and when they met again in November to negotiate a definitive license agreement. By its own estimate, PharmAthene believed that the total market potential of ST–246 had increase roughly three times, from approximately $1 billion to approximately $3 billion. This may explain PharmAthene's willingness to consider increasing its aggregate payments to SIGA and to include a more generous profit split in the deal in lieu of the more complicated royalty scheme set forth in the LATS.[FN237] As previously discussed, PharmAthene offered an across-the-board 50/50 profit split and, thus, presumptively would have agreed to that term. Moreover, given that its own estimate of the market potential had increased roughly threefold, a commensurate multiple represents a responsible estimate of the amount by which PharmAthene would have agreed to increase its aggregate payments under the LATS— *i.e.,* an increase from aggregate payments of $16 million to something in the range of $40 to $45 million. Accordingly, as of late November 2006, PharmAthene reasonably could have expected to consummate a license agreement under which it would pay SIGA, in the aggregate, $40 to $45 million in exchange for an across-the-board share of the proceeds derived from ST–246—that is, of course, if SIGA were also amenable to such a deal.

FN237. T. Tr. 228 (Richman).

SIGA was, in fact, amenable. Even before the November 6 meeting and preparation of the November 21 Draft LLC Agreement, SIGA had begun to contemplate a transaction comprising a lump sum payment to buy into a 50% profit participation in ST–246. To that end, someone at SIGA apparently asked its controller, Dugary, to suggest a dollar amount for such a lump sum payment supporting a 50/50 profit split. On October 18, Dugary emailed Fasman, Borofsky, Savas, and Konatich a four-page presentation, which concluded that "past *and future* [ST–246] related investments and costs" equaled $39.66 million, "supporting an up-front license fee of $40 million[ ] to buy into a 50% participation in future profits from the product." [FN238] Although Dugary used the term "up-front license fee," the weight of the evidence convinces me that she used that term loosely to include all the *non*-royalty payments mentioned in the LATS, *i.e.,* the upfront licensee fee, the deferred license fee, and milestone payments. In late 2005, when negotiations for the LATS first began, SIGA estimated that it needed approximately $16 million to complete development of ST–246.[FN239] After active negotiations, the LATS provided SIGA an aggregate of $16 million, apportioned between upfront license fees, deferred license fees, and milestone payments. Dugary's use of the language "past *and future* " ST–246 expenses shows that, by October 2006, SIGA had revised its estimated needs to complete development of ST–246. Just as the LATS fully provided for ST–246's then estimated development costs, the $40 million payment suggested by Dugary would be sufficient to cover all of ST–246's newly estimated development costs. Accordingly, it is reasonable to infer from the evidence that, as of October 2006, SIGA would have considered an aggregate payment of $40 million adequate to support a 50/50 split of future profits from ST–246.

FN238. JTX 437 Attach. at 2 (emphasis added).

FN239. T. Tr. 1397 (Konatich).

***41** Fasman's statement at the November 6 meeting with PharmAthene that the upfront pay-

ment would need to be increased to "$40 to $45 million or more" likely originated from Dugary's October 18 presentation. Had SIGA negotiated in good faith, it would have proposed a transaction consistent with Dugary's presentation: a lump sum payment in an amount sufficient to cover the revised development costs of ST–246, *i.e.,* $39.66 million or more, in exchange for a 50% profit participation without any further license, milestone, or royalty payments. Instead, SIGA proposed the Draft LLC Agreement, which called for upfront and milestone payments of $335 million and a royalty of 18% to 28% on net sales as well as a pure 50/50 profit split thereafter. The stark contrast between Dugary's October 18 presentation and the later Draft LLC Agreement underscores SIGA's lack of good faith in proposing the Draft LLC Agreement.

The term of the prospective license also remained relatively constant throughout all stages of negotiation. The LATS provides for a Royalty Term, on a country-by-country basis, of the later of the last relevant patent to expire or ten years from ST–246's first commercial sale.[FN240] Similarly, PharmAthene's Proposed License Agreement provides for a Royalty Term of, "with respect to each country, the later of (a) the last Siga Patent to expire in that country that claims the composition, manufacture, or use of Product or (b) ten (10) years after the date of the first commercial sale of a Product in such country." [FN241] SIGA's Draft LLC Agreement generally preserved this same licensing term. Under Section 2. 1, the LLC expires on the date of the last Additional Distribution Period to expire or upon any Dissolution Event (*e.g.,* written consent of all Members or a judicial dissolution). [FN242] The Draft LLC Agreement defines "Additional Distribution Period" as ending, on a country-by-country basis, "upon the later to occur of: (a) the latest date on which such Product is covered by one or more SIGA Patent claims ... in such country; and (b) the expiration of ten (10) years from such date of the first commercial sale of such Product in such country." [FN243] Accordingly, the Draft LLC Agreement also generally provides for a license term lasting from execution of the agreement to at least ten years after the date of the first commercial sale of ST–246 or any product derived from it.

FN240. LATS at 2.

FN241. Proposed License Agreement at 1.

FN242. *See* Draft LLC Agreement §§ 1.1, 12.1 (defining "Dissolution Event").

FN243. *Id.* § 1.1.

Because neither party presented evidence regarding specific patents relating to ST–246 or the countries in which such patent coverage exists, I will limit the equitable lien on sales of ST–246 to a term of ten years from ST–246's, or a closely related product's, first commercial sale. Any attempt to expand the term to encompass countries and sales for which patent coverage does not expire until after ten years from the first commercial sale would force this Court into an unacceptably onerous enforcement or supervisory role.

Finally, at all stages of negotiation, PharmAthene undertook to fund all R & D expenses related to ST–246.[FN244] The passage of time, however, largely has mooted this aspect of the parties' prospective license. Between initiation of negotiations for the LATS in late 2005 and trial in 2011, SIGA received nearly $100 million in development funds from the U.S. government. For example, the NIH and NIAID awarded SIGA $4.8 million in August 2006, $16.5 million in September 2006, $75 million (in two distinct grants) in September 2008, and $3 million in September 2009.[FN245] Indeed, the same day that SIGA received the $16.5 million contract from the NIH in September 2006, Hruby emailed Drapkin, saying the "[b]ottom line is the product's entire development is supported...." [FN246] As stated above, Dugary later revised the estimated past and future development costs of ST–246 to $39.66 million. Even assuming additional changed circumstances or mere exaggeration or optimism by

Hruby and Dugary, SIGA has received close to $80 million in government support since Hruby and Dugary estimated ST–246's R & D costs in late 2006.

> FN244. LATS at 1 ("PHTN would fund research at SIGA"); Proposed License Agreement § 2.2 ("PharmAthene will fund research at Siga"); Draft LLC Agreement § 5.1(c) ("PharmAthene shall fund and guarantee ... the payment of one hundred percent (100%) of all operations, activities, obligations, and expenditures of the [LLC].... This will include, without limitation, ... SIGA and PharmAthene research and Development ...").
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> FN245. Baliban Report ¶ 25 (citing SIGA SEC filings disclosing each government contract); Baliban Rebuttal Report at 11–12 (same).
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> FN246. JTX 260 ¶ 9.

***42** Moreover, to whatever extent PharmAthene's expectancy may have included the expense to fund fully R & D of ST–246, its expectancy also would have included the intangible right to exercise significant, if not exclusive, control over the development of ST–246.[FN247] In fact, SIGA has and will continue to have full control over ST–246. Appropriate relief, therefore, requires taking into account PharmAthene's loss of that right. In this regard, I find informative Edwards's expert opinion that, with respect to pharmaceutical license agreements generally, "control over the pace of development and expenditures required for commercialization" is the compensation received for undertaking the substantial cost and risk to fund R & D expenditures.[FN248] The equitable payment stream discussed in this Opinion does not provide PharmAthene with "control over the pace of development and expenditures required for commercialization." To the contrary, the only means to provide PharmAthene with that control would be to compel specific performance of the LATS or a license agreement based thereon. For the various reasons previously discussed, specific performance is not appropriate in this case. Accordingly, the best alternative to compensate PharmAthene for this loss of control over the development of ST–246 is to relieve it of the attendant operational costs it would have paid for it. In sum, based on the level of government funding and my decision to include an initial setoff loosely corresponding to the aggregate license fee and milestone payments, I perceive no remedial justification for the equitable payment stream I am ordering to provide SIGA any additional setoffs based on R & D costs PharmAthene would have borne under a consummated license agreement. Were I to do otherwise, SIGA would reap a windfall.

> FN247. LATS at 1 (granting PharmAthene a "worldwide *exclusive* license" to develop ST–246 (emphasis added)); Proposed License Agreement § 3.1 (granting PharmAthene "an *exclusive[ ]* right and license" to develop ST–246 (emphasis added)); Draft LLC Agreement § 3.2(a) (granting PharmAthene the power to appoint half of the LLC's managers).
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> FN248. Edwards Report ¶ 21.

In the final analysis, a responsible estimate of what PharmAthene should have received had SIGA negotiated in good faith (*i.e.*, its expectancy interest) is a definitive license agreement providing, at the least, an interest in ST–246 for which, after paying SIGA approximately $40 million, PharmAthene would receive 50% of all profits derived from sales of ST–246 and related products. Moreover, PharmAthene should have received this benefit for a period of at least ten years following the first commercial sale of any product derived from ST–246. Employing what Chancellor Strine termed "remedial discretion" in *Greka,* [FN249] I find that a payment stream consistent with the above terms would compensate PharmAthene for its expectancy interest with sufficient certainty to meet the requirements for relief from a breach of contract and

promissory estoppel and to prevent injustice in the circumstances of this case.

FN249. *Greka,* 2001 WL 984689, at *17.

Accordingly, I grant PharmAthene's request for expectation or reliance damages in the form of an "equitable payment stream" or an equitable lien on all sale proceeds from ST–246 and related products as follows: once SIGA earns $40 million in net profits or margin from net sales of ST–246, PharmAthene shall be entitled to 50% of all net profits from such sales thereafter for a period from entry of this judgment until the expiration of ten years following the first commercial sale of any product derived from ST–246.[FN250] Additionally, SIGA shall be required to keep records showing the sales or other dispositions of ST–246 and related products and showing any deductions from such sales or dispositions in deriving "net sales" or profits in sufficient detail to enable the amount due to PharmAthene to be determined. Furthermore, PharmAthene shall be entitled to examine those records on an annual basis to the extent necessary to verify the payments, if any, to which it is entitled under this Opinion.

FN250. I employ the terms "net sales" and "net margin" or profits from the LATS and in accordance with their customary and ordinary usage in the patent licensing context. I leave to the parties, however, the task of providing a working definition for "net sales" and "net profits" when submitting a proposed form of final judgment conforming to this Opinion. *See supra* note 33 (regarding the customary meaning of "net sales"); *see infra* Part III (requiring the parties to submit a proposed form of final judgment). In this instance, however, the parties should include in the definition of "net sales," or elsewhere in the proposed judgment, proceeds from any dispositions of the intellectual property rights to ST–246 within the specified term (*e.g.,* should SIGA license, assign, or otherwise transfer any such rights to ST–246 to a third party). To the extent the parties cannot agree, the Court will impose the required terms in accordance with industry practice.

2. Attorneys' fees

***43** The Court of Chancery is empowered by statute to "make such order concerning costs in every case as is agreeable to equity." [FN251] The term "costs" in this context is interpreted to include attorneys' fees in an appropriate case.[FN252] Delaware courts follow the general "American Rule" that courts do not award attorneys' fees to the prevailing party.[FN253] Exceptions to the rule may exist, however, where, among other things, (1) there is a contractual provision entitling a party to attorneys' fees [FN254] or (2) the party against whom attorneys' fees are assessed has acted in bad faith. [FN255] As to the contractual entitlement exception, under both Delaware and New York law, courts will interpret a clear and unambiguous contract in accordance with the ordinary and usual meaning of its language.[FN256] With respect to the bad faith exception, the conduct warranting attorneys' fees may include the "behavior that underlies and forms the basis of the action ... [but] in only the most egregious instances of fraud or overreaching." [FN257]

FN251. 10 *Del. C.* § 5106.

FN252. *Kerns v. Dukes,* 707 A.2d 363, 369 (Del.1998) ("[T]he Court of Chancery may award attorneys' fees as costs pursuant to 10 *Del. C.* § 5106 ... where, in its discretion, the equities so dictate.") (citing *Wilmington Trust Co. v. Coulter,* 208 A.2d 677, 681–82 (Del. Ch.1965)).

FN253. *Arbitrium (Cayman Is.) Handels v. Johnson,* 705 A.2d 225, 231 (Del. Ch.1997).

FN254. *NW. Nat'l. Ins. Co. v. Esmark, Inc.,* 672 A.2d 41, 43–44 (Del.1996) (holding a

hold-harmless agreement provided for reimbursement for expenses and attorneys' fees).

FN255. *Reagan v. Randell,* 2002 WL 1402233, at *3 (Del. Ch. June 21, 2002) (quoting *Arbitrium,* 705 A.2d at 225).

FN256. *NW Nat'l. Ins. Co.,* 672 A.2d at 43 (citing *Rhone–Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.,* 616 A.2d 1192, 1195 (Del.1992)); *Greenfield v. Phillies Records, Inc.,* 780 N.E.2d 166, 170 (N.Y.2002) ("[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.").

FN257. *Arbitrium,* 705 A.2d at 231; *see also Kaung v. Cole Nat'l Corp.,* 2004 WL 1921249, at *6 (Del. Ch. Aug. 27, 2004) (awarding attorneys' fees under bad faith exception where litigation conduct rose to "glaring egregiousness"), *aff'd in part, rev'd in part,* 884 A.2d 500 (Del.2005).

PharmAthene is entitled to an award of a portion of its attorneys' fees under both the contractual entitlement and the bad faith exceptions. I address first the contractual entitlement. Section 7.5 of the Bridge Loan Agreement provides as follows:

> The Issuer [SIGA] shall pay, and hold the Holder [PharmAthene] harmless against all liability for the payment of, all costs and other expenses incurred by any such Holder in connection with the Issuer's performance of and compliance with all agreements and conditions set forth herein....

Similarly, Section 7.6 provides:

> The Issuer will defend, indemnify, and hold harmless the Holder ... from and against any and all claims, demands, penalties, causes of action, fines, liabilities, settlements, damages, costs, or expenses of whatever kind or nature ... (including, without limitation, counsel and consultant fees and expenses ...) arising out of this Agreement ... or the transactions contemplated hereby ...; or in any way related to the inaccuracy, breach of or default under any representations, warranties or covenants of the Issuer set forth herein....

There can be no dispute that PharmAthene incurred its attorneys' fees, in part, in connection with SIGA's non-performance of and non-compliance with its obligations under Section 2.3 of the Bridge Loan Agreement to negotiate in good faith a definitive license agreement in accordance with the LATS. Similarly, PharmAthene's claims, damages, costs, and expenses incurred in this action arise, in part, out of Section 2.3, and at least a portion of PharmAthene's attorneys' fees relate to SIGA's breach of its express covenant to negotiate in good faith under that section.[FN258] Based on the plain meanings of SIGA's obligations under Section 7.5 to "pay all costs and other expenses incurred by [PharmAthene] in connection with [SIGA's] performance" of the Bridge Loan Agreement as well as under Section 7.6 to "defend, indemnify, and hold harmless" PharmAthene from "expenses of whatever kind or nature ... (including, without limitation, counsel and consultant fees and expenses)" that "in any way relate[ ] to ... [SIGA's] breach of ... any ... covenants," I also conclude that PharmAthene is entitled to recover its attorneys' fees and expenses in this action related to SIGA's breach.

FN258. I do not interpret the language in Section 7.6 referring "in any way ... to a breach of ... any representations, warranties or covenants of the Issuer" as strictly limited only to breaches of Articles III, entitled "Representations and Warranties," or V, entitled "Covenants." Rather, the legal definition of "covenant" is simply "[a] formal agreement or promise, usu. in a contract." *Black's Law Dictionary* 391 (8th ed.2004). SIGA formally agreed and promised in Section 2.3 to negotiate in good faith, and it breached that

promise. Therefore, the provisions of Section 7.6 apply to SIGA's breach of Section 2.3.

***44** Alternatively, PharmAthene is entitled to its attorneys' fees under the bad faith exception to the American Rule. In *Greka,* Chancellor Strine awarded attorneys' fees because "RGC was forced by Greka's bad faith conduct to litigate to consummate the transaction contemplated by the Term Sheet." [FN259] Here, SIGA had contractual obligations to negotiate in good faith a license agreement for ST–246 in accordance with the terms of the LATS. Yet, SIGA insisted, among other things, that the $16 million of upfront, deferred, and milestone payments contemplated by the LATS be increased to an astronomical $335 million. Moreover, it proposed and maintained that the royalty of, at most, 12% contemplated by the LATS be increased to a maximum and likely widely applicable royalty of 28% *and* a 50/50 split on all profits thereafter under the Draft LLC Agreement. Based on these and other relevant facts, I find that SIGA breached its contractual obligations and engaged in a glaringly "egregious instance[ ] of ... overreaching" [FN260] sufficient to warrant an award of attorneys' fees under the bad faith exception to the American Rule.

FN259. *Greka,* 2001 WL 984689, at *19 (Del. Ch. Aug. 22, 2001).

FN260. *See Arbitrium,* 705 A.2d at 231.

At the same time, however, I conclude that PharmAthene is entitled to only a portion of the attorneys' fees and expenses it actually incurred. Throughout this litigation, PharmAthene has split its case into roughly equal parts: first, in Counts One through Four, it claimed that the LATS itself was binding and justified specific enforcement of a license agreement, and second, in Counts Five through Seven, PharmAthene asserted that SIGA breached its obligation to negotiate in good faith and unjustly benefitted by so doing. The contractual and bad faith exceptions to the American Rule that justify attorneys' fees in this case relate only to the latter set of claims. At a maximum, therefore, PharmAthene should recover only one-half of its attorneys' fees.[FN261] Moreover, although liability rests on approximately half of PharmAthene's claims, PharmAthene devoted the majority of its pretrial and trial arguments, as well as time and expense, to its ultimately unsuccessful requests for relief in the form of either specific performance or a specific dollar amount of expectation damages based primarily on its position that the LATS was enforceable. Because I found the LATS unenforceable, much of that time and expense is not reimbursable. Rather, my sense is that only one-third of PharmAthene's arguments, time, and expense related to the bases of liability and form of relief I have found and ordered, respectively. To a degree, PharmAthene's proof and arguments interrelate with one another. Consequently, it might not be possible as a practical matter to distinguish billings related solely to one set of issues versus another. Thus, in an exercise of the discretion granted to me by statute, I award PharmAthene one-third of the reasonable attorneys' fees it incurred in this action. [FN262]

FN261. *See Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC,* 2010 WL 338219, at *29 (Del. Ch. Jan. 29, 2010) (awarding one-half attorneys' fees where plaintiff prevailed on only approximately half of its claims).

FN262. *See* 10 *Del. C.* § 5106 (affording the Court equitable discretion in its award of attorneys' fees).

3. Expert witness fees

***45** The Court of Chancery also possesses discretionary authority to tax expert witness fees as among the costs generally borne by the non-prevailing party.[FN263] In an exercise of that discretion, the Court may decline to tax expert witness fees as costs where the expert's testimony was not helpful. [FN264] Expert reports and testimony presented to the Court in this case addressed primarily whether the LATS is an enforceable con-

tract and, if so, the appropriate measure of damages for its breach. Here too, because the Court found the LATS unenforceable, expert testimony to the contrary and in support of assessing damages on the premise that the LATS was enforceable ultimately was of only limited value to the Court. Nonetheless, at various times throughout this litigation and in this Opinion, the Court has relied on certain evidence provided by PharmAthene's experts to understand important aspects of the context and background regarding biopharmaceutical patent licensing and ST–246, generally, and the market for it, in particular.[FN265] As with attorneys' fees, this proportion of helpful to unhelpful expert evidence cannot be computed with mathematical precision, but I find that approximately one-third of that expert evidence, in fact, was helpful. Accordingly, the costs taxed to SIGA shall include one-third of the expert witness fees incurred by PharmAthene.

FN263. 10 *Del. C.* § 8906 ("The fees for witnesses testifying as experts ... shall be fixed by the court in its discretion, and such fees so fixed shall be taxed as part of the costs in each case...."); Ct. Ch. R. 54(d) ("Except when express provision therefor is made either in a statute or in these Rules, costs shall be allowed as of course to the prevailing party....").

FN264. *Oliver v. Boston Univ.*, 2009 WL 1515607, at *3 (Del. Ch. May 29, 2009) (declining to tax as costs expert fees where the court "did not rely upon" and "was not helped by" the expert testimony); *Barrows v. Bowen*, 1994 WL 514868, at *3 (Del. Ch. Sept. 7, 1994) (declining expert witness fees where court "did not find [the expert]'s opinion helpful").

FN265. *See, e.g., supra* notes 74, 140, 248.

III. CONCLUSION

For the foregoing reasons, I find that SIGA is not liable for Counts One through Four and Count Seven of Plaintiff's Amended Complaint, but that SIGA is liable to PharmAthene for Counts Five and Six—namely the claims for breach of contractual obligations to negotiate a license agreement in good faith and promissory estoppel. Judgment, therefore, will be entered for an equitable payment stream or equitable lien on the profits or other qualifying proceeds associated with the commercial sale of ST–246 or products derived from it in accordance with the terms specified in Part II.E.1.c. of this Opinion. In addition, PharmAthene is awarded one-third of its reasonable attorneys' fees and expert witness costs, as well as its other costs under Rule 54(d).

Counsel for PharmAthene shall submit, on notice, a proposed form of final judgment reflecting these rulings within twenty (20) days of the date of this Opinion. The proposed form of final judgment should include a request for attorneys' fees and expenses in accordance with the procedures prescribed in Rule 88.

Del.Ch.,2011.
Pharmathene, Inc. v. Siga Technologies, Inc.
Not Reported in A.3d, 2011 WL 4390726 (Del.Ch.)

END OF DOCUMENT

EXHIBIT D

Not Reported in A.3d, 2011 WL 6392906 (Del.Ch.)
(Cite as: 2011 WL 6392906 (Del.Ch.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.
PHARMATHENE, INC., a Delaware corporation, Plaintiff,
v.
SIGA TECHNOLOGIES, INC., a Delaware corporation, Defendant.

Civil Action No. 2627–VCP.
Submitted: Oct. 12, 2011.
Decided: Dec. 16, 2011.

A. Richard Winchester, Esq., Christopher A. Selzer , Esq., McCarter & English, LLP, Wilmington, Delaware; Roger R. Crane, Esq., Christopher R. Carton, Esq., K & L Gates LLP, New York, New York; Attorneys for Plaintiff.

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MEMORANDUM OPINION

PARSONS, Vice Chancellor.

***1** In an Opinion dated September 22, 2011 (the "September 22 Opinion"), I held that Defendant, SIGA, is liable (1) for breaching an express contractual obligation to negotiate in good faith a license agreement for a biodefense pharmaceutical known as ST–246 and (2) under the doctrine of promissory estoppel.[FN1] In terms of relief, I denied Plaintiff, PharmAthene's, requests for specific performance of the LATS, the term sheet on which the final license agreement was to be based, or for a lump sum award of expectation damages. Instead, I awarded, among other remedies, an "equitable payment stream" in the vein of a constructive trust or equitable lien as follows: "once SIGA earns $40 million in net profits or margin from net sales of ST–246, PharmAthene shall be entitled to 50% of all net profits from such sales thereafter for a period from entry of this judgment until the expiration of ten years following the first commercial sale of any product derived from ST–246." [FN2] As a court of equity, I concluded that this remedy reasonably compensates PharmAthene for its lost expectancy (*i.e.,* what PharmAthene would have received had a license agreement been negotiated in good faith), [FN3] was necessary to provide "such relief as justice and good conscience may require," [FN4] and was consistent with my "broad discretion to form an appropriate remedy for a particular wrong." [FN5]

FN1. *PharmAthene, Inc. v. SIGA Techs., Inc.,* 2011 WL 4390726, at *2 (Del.Ch. Sept.22, 2011) [hereinafter September 22 Opinion]. Defined terms in the September 22 Opinion are used in the same way and with the same designations in this Memorandum Opinion.

FN2. *Id.* at *42.

FN3. *Id.* at *39.

FN4. *Id.* at *34 (quoting *Lichens Co. v. Standard Commercial Tobacco Co.,* 40 A.2d 447, 452 (Del.Ch.1944)).

FN5. *Id.* (quoting *Whittington v. Dragon Gp. LLC,* 2011 WL 1457455, at *15 (Del.Ch. Apr.15,2011)).

On October 4, SIGA moved under Court of Chancery Rule 59(f) for reargument as to the "unprecedented remedy" [FN6] ordered in the September 22 Opinion. [FN7] Specifically, SIGA contends I misapplied the law and misunderstood material facts in awarding PharmAthene an equitable lien on a share of future profits derived from

ST–246. As to the law, SIGA argues: (1) that PharmAthene did not request or brief this remedy and, therefore, I was without authority to grant it; and (2) that the equitable remedy ordered is inconsistent with the legal requirement that damages be proven with reasonable certainty. As to the facts, SIGA claims I misapprehended the record in prescribing the terms of the equitable payment stream ordered because there is insufficient evidence to conclude that either party would have agreed to a license agreement providing only for a one-time payment from PharmAthene to SIGA of $40 million in exchange for a 50/50 profit split without other payments. Additionally, SIGA maintains that there is no basis in law or fact for restructuring an "actual" payment of $40 million as a credit against the first $40 million of net profits as the equitable payment stream prescribes.[FN8] For the reasons stated in this Memorandum Opinion, I deny SIGA's Motion.

FN6. Def.'s Mot. for Reargument ("Def.'s Mot.") 1.

FN7. Although Rule 59(f) requires a party to move for reargument "within 5 days after the filing of the Court's opinion or the receipt of the Court's decision," SIGA moved on September 27 to extend that five-day deadline pursuant to Rule 6(b). The Court granted an extension until October 4.

FN8. Def.'s Mot. 11.

I. DISCUSSION

A. Standard

The standard applicable to a motion for reargument is well-settled. To obtain reargument, the moving party "bear[s] a heavy burden ... [to] demonstrate [ ] that the court's decision 'rested on a misunderstanding of a material fact or a misapplication of law.' " [FN9] A misapprehension of the facts or the law must be both material and outcome determinative of the earlier litigation for the movant to prevail.[FN10] Moreover, "[r]eargument under Court of Chancery Rule 59(f) is only available to re-examine the existing record; therefore, new evidence generally will not be considered on a Rule 59(f) motion." [FN11] Additionally, motions for reargument must be denied when a party merely restates its prior arguments.[FN12]

FN9. *In re ML/EQ Real Estate P'ship Litig.*, 2000 WL 364188, at *1 (Del.Ch. Mar.22, 2000) (quoting *Arnold v. Soc'y for Sav. Bancorp*, 1995 WL 408769, at *1 (Del.Ch. June 30, 1995)).

FN10. *Aizupitis v. Atkins*, 2010 WL 318264, at *1 (Del.Ch. Jan.27, 2010); *Medek v. Medek*, 2009 WL 2225994, at *1 (Del.Ch. July 27, 2009); *Serv. Corp. of Westover Hills v. Guzzetta*, 2008 WL 5459249, at *1 (Del.Ch. Dec.22, 2008).

FN11. *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708, at *1 (Del.Ch. Dec.31, 2007); *Nevins v. Bryan*, 2006 WL 205064, at *3 (Del.Ch. Jan.20, 2006).

FN12. *Guzzetta*, 2008 WL 5459249, at *1; *Reserves Dev. LLC*, 2007 WL 4644708, at *1; *Nevins*, 2006 WL 205064, at *3.

B. Did the Court Misapply the Law?

***2** SIGA's first ground for reargument is that PharmAthene did not request or brief a profit participation. SIGA contends that PharmAthene therefore waived any right to receive a profit participation and that "due process and fairness concerns preclude the Court's *sua sponte* imposition of this remedy...." [FN13] Although PharmAthene could have articulated its request for an equitable payment stream with greater precision, it actually did make such a request. Indeed, I stated this conclusion explicitly in a footnote to the September 22 Opinion:

FN13. Def.'s Mot. 4.

PharmAthene's description of its so-called

"equitable payment stream" is not entirely consistent. By requesting a payment stream "economically equivalent to the lump sum damages amount determined by Baliban," PharmAthene seems to request, in effect, an annuity with a net present value equal to Baliban's estimate of its expectation damages. [PL's Post–T. Op. Br. 65.] Nevertheless, PharmAthene argues that its requested relief would mirror SIGA's return on sales of ST–246 and, thus, "mitigate any uncertainties around the future sales of ST–246...." *Id.* at 66. Based on this latter argument, I understand PharmAthene's use of the phrase "equitable payment stream" to mean an on-going profit participation in future sales, if any, of ST–246.[FN14]

FN14. September 22 Opinion, 2011 WL 4390726, at *29 n. 167. SIGA further attempts to manufacture a difference between PharmAthene's request for a payment stream on "sales," as requested in its briefs, and a participation in "profits," as awarded in the September 22 Opinion, because the Court previously determined that it would not award a patent infringement measure of damages in this case. Def.'s Mot. 3. During the summary judgment phase of this case, PharmAthene advocated for a patent measure of damages, arguably supported by federal case law, that would impose a reasonable royalty for SIGA's alleged "breach" of the patents covering ST–246. PL's Br. in Opp'n to Def's Mot. for Partial Summ. J. 64. In that regard, PharmAthene suggested the Court could award as such a royalty the one-sided terms of the Draft LLC Agreement *against* SIGA and in favor of PharmAthene. *Id.* The Court rejected that contention and ruled that a patent measure of damages, statutory in nature and applicable only to patent infringement cases, is inappropriate in a contract case. *SIGA II,* 2010 WL 4813553, at *13 (Del.Ch. Nov.23, 2010). In the September 22 Opinion, however, the Court held that PharmAthene's request for an equitable payment stream was more akin to the imposition of an equitable lien and, therefore, different because, "unlike a 'reasonable royalty' under the patent laws, the equitable remedy of an equitable lien is independent of and does not rely on federal patent law doctrine." 2011 WL 4390726, at *39. Accordingly, this Court's ruling on summary judgment did not foreclose the possibility that it might award the relief provided for in the September 22 Opinion.

In any event, the cases SIGA cites in its Motion regarding waiver of arguments not properly raised provide no basis for constraining this Court's "discretion to tailor remedies to suit the situation as it exists." [FN15] The general rule, correctly stated by SIGA, that a party waives any argument it fails properly to raise shows deference to fundamental fairness and the common sense notion that, to defend a claim or oppose a defense, the adverse party deserves sufficient notice of the claim or defense in the first instance.[FN16] Thus, in *Adams v. Calvarese Farms Maintenance Corp .*,[FN17] a plaintiff received no relief for claims asserted in its complaint but ultimately not addressed at trial, and in *Emerald Partners v. Berlin,*[FN18] the court refused to consider an affirmative defense raised for the first time on remand after appeal. That reasoning, however, has less force in the context of the Court's power to award a remedy. Once the question becomes the *form* of relief, as opposed to the *right* to relief, "the powers of the Court [of Chancery] are broad and the means flexible to shape and adjust the precise relief to be granted so as to enforce particular rights and liabilities legitimately connected with the subject matter of the action." [FN19] To that end, this Court frequently has relied on its own remedial discretion to fashion a different remedy than what the parties may have requested when the circumstances so require.[FN20]

FN15. *Cantor Fitzgerald, L.P. v. Cantor,* 2001 WL 536911, at *3 (Del.Ch. May 11,

2001) (quoting *Andersen v. Bucalo,* 1984 WL 8205, at *4 (Del.Ch. Mar.14, 1984)).

FN16. *See Riggs Nat'l Bank v. Boyd,* 2000 WL 303308, at *3 (Del.Super.Feb.23, 2000) (citing *Campbell v. Walker,* 76 A. 475, 476 (Del.1910)).

FN17. 2010 WL 3944961, at *21 (Del.Ch. Sept.17, 2010).

FN18. 2003 WL 21003437, at *43 (Del.Ch. Apr.28, 2003), *aff'd,* 840 A.2d 641 (Del.2003).

FN19. *Wilmont Homes, Inc. v. Weiler,* 202 A.2d 576, 580 (Del.1964).

FN20. *See McGovern v. Gen. Hldg., Inc.,* 2006 WL 1468850, at *24 (Del.Ch. May 18, 2006) ("The Supreme Court has emphasized the capacious remedial discretion of this court to address inequity. Using that discretion, I conclude that none of the parties has advanced a completely acceptable remedy."); *Walker v. Res. Dev. Co.,* 791 A.2d 799, 811 (Del.Ch.2000) ("These failures [to prove damages] do not leave [plaintiff] without a remedy.... [The ability to trace wrongfully expropriated membership interest to shares in a new company] provides a framework on which to consider an award in equity—such as the imposition of a constructive trust on a portion of those shares."); *Andresen v. Bucalo,* 1984 WL 8205, at *5 (Del.Ch. Mar.14, 1984) ("In seeking [additional briefing on remedies to protect innocent stockholders in derivative action], however, I am not limiting the Court to remedies that the parties may propose."); *cf. Berger v. Pubco Corp.,* 976 A.2d 132, 139 (Del.2009) ("We nonetheless identify and consider [remedies advocated by no party on a question of first impression], because to do otherwise would render our analysis truncated and incomplete.").

Nor does such an exercise of remedial discretion offend due process, as SIGA contends. Rather, the two cases SIGA cites to support that contention— *Beck & Panico Builders, Inc. v. Straitman* [FN21] and *Ramsey v. Ajax Distributors, Inc.* [FN22] —are readily distinguishable. In *Straitman,* the trial court effectively amended the plaintiffs complaint after trial to add unasserted claims and thereby deprived the defendant of sufficient notice of the evidence it needed to present at trial to defend itself.[FN23] In *Ramsey,* the court granted reargument after conceding that it might have acted "hastily" in dismissing a case for lack of subject matter jurisdiction (*i.e.,* denying the plaintiff his day in court) before affording the parties an opportunity to brief the question.[FN24] But, neither case stands for the proposition that a court of equity would offend due process by awarding a remedy alleged to have been briefed inadequately.

FN21. 2009 WL 5177160 (Del.Super.Nov.23, 2009).

FN22. 1975 WL 21608 (Del.Ch. Oct.29, 1975).

FN23. 2009 WL 5177160, at *5.

FN24. 1975 WL 21608, at *1.

***3** SIGA's second ground for seeking reargument is that the Court misapprehended the law in awarding an equitable remedy that fails to comport with the requirement at law that damages be proven with reasonable certainty. In the September 22 Opinion, the Court acknowledged that there apparently is not yet a consensus in Delaware or in other jurisdictions as to whether a breach of an express contractual obligation to negotiate in good faith is susceptible to a remedy at law of expectation damages, or limited to only reliance damages.[FN25] Ultimately, however, the Court concluded that PharmAthene had not shown an entitlement to a specific amount of expectation damages because

even a consummated license agreement for ST–246, which was not yet marketable, "would have contained the risk of receiving no profits" and, therefore, "such an award would be speculative." [FN26] Additionally, the Court concluded that the alternative of reliance damages would have been "basically *de minimis* " under the circumstances of this case and, therefore, inadequate.[FN27]

FN25. 2011 WL 4390726, at *31–34.

FN26. *Id.* at *33.

FN27. *Id.* at *35.

Although at law "no recovery can be had for loss of profits which are determined to be uncertain, contingent, conjectural or speculative," [FN28] this Court still possesses authority to provide an equitable remedy where there is no adequate remedy at law .[FN29] Furthermore, this Court enjoys remedial flexibility to depart from strict application of the ordinary forms of relief where circumstances require.[FN30] Nevertheless, courts of equity should attempt to balance that flexibility by a measure of concomitant restraint to minimize uncertainty.[FN31]

FN28. *Id.* at *31 (internal quotation marks and footnote omitted).

FN29. *See* 10 *Del. C.* § 342 (conferring jurisdiction, by negative implication, to determine matters lacking an adequate remedy at law); *Wilmont Homes, Inc. v. Weiler,* 202 A.2d 576, 580 (Del.1964) ("Fundamentally, once a right to relief in Chancery has been determined to exist, the powers of the Court are broad and the means flexible to shape and adjust the precise relief to be granted so as to enforce particular rights and liabilities legitimately connected with the subject matter of the action.").

FN30. *See, e.g., HMG/Courtland Props., Inc. v. Gray,* 749 A.2d 94, 122 (Del.Ch.1999) ("I have crafted a remedy tailored to the specific facts of this case ... [']from the panoply of equitable remedies' ...." (quoting *Ryan v. Tad's Enters., Inc.,* 709 A.2d 682, 699 (Del.Ch.1996))); *see also* 1 *Pomeroy's Equity Jurisprudence* § 109 (5th ed. 1941) ("Equitable remedies ... are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use.").

FN31. *See Greenhill Inv. Co. v. Tabet,* 1986 WL 412, at *7 (Del.Ch. Oct.31, 1986) ("With the advantage of flexibility, however, comes the danger that the exceptional cases in which equitable relief is granted may come to destroy the utility of the general rule. Thus, the flexibility afforded by the equitable approach may come, at times, at the expense of commercial certainty, although the extent to which commercial certainty is sacrifi[ced] can, by judicial restraint, be minimized.").

In this case, the Court found that SIGA was in a precarious financial condition in late 2005 and entered into a Bridge Loan Agreement with PharmAthene, among other things, that enabled SIGA to continue development of ST–246. In exchange, PharmAthene bargained for, at the least, the right to faithful negotiations for a license of ST–246 in accordance with the terms of the LATS the parties previously had negotiated. SIGA, however, denied PharmAthene the benefit of its bargain by conducting those negotiations in bad faith and, thus, is liable for breach of contract and under the doctrine of promissory estoppel. After determining that PharmAthene lacked an adequate remedy at law, the Court directed its attention to equitable remedies, such as a constructive trust or equitable lien, and the possibility that they might be appropriate here. Thus, the Court structured its remedy analysis as follows: "the Court's task is, first, to derive a responsible estimate of 'what [PharmAthene] should have received if the [license

agreement] had been consummated' (*i.e.,* to determine PharmAthene's expectancy interest) and, second, to provide a remedy that reasonably compensates PharmAthene for that lost expectancy." [FN32] The fact that the Court imposed an equitable remedy reasonably designed to compensate PharmAthene for its lost expectancy does not mean, however, that the Court misapprehended the law of remedies. [FN33] To the contrary, the Court found the underlying purposes of a constructive trust and equitable lien applicable to the circumstances of this case and endeavored to tailor those remedies to redress a wrong, prevent injustice, and award an appropriate remedy in the form of an equitable payment stream.[FN34] The Court did not misapprehend the law in so doing.

FN32. September 22 Opinion, 2011 WL 4390726, at *39 (footnote omitted).

FN33. SIGA's further contention that the Court misapprehended the facts by unduly speculating as to the *value* of PharmAthene's lost expectancy in deciding the precise terms of the equitable payment stream it ordered is addressed in Part I.C, *infra.*

FN34. *See Hogg v. Walker,* 622 A.2d 648, 652 (Del.1993) (purpose of a constructive trust is to redress a wrong rather than effect the intent of the parties); *Adams v. Jankouskas,* 452 A.2d 148, 152 & n. 4 (Del.1982) (quoting 1 *Pomeroy's Equity Jurisprudence* § 166, at 210–11 (5th ed.1941)) (constructive trusts prevent injustice, even in the absence of an express contract, where one party obtains title to property in any unconscionable manner); *see also* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 12.07[d] at 12–104 (2010) ("The Court of Chancery, however, also may impress an equitable lien in the absence of an express agreement, out of a recognition of general equitable principles of right and justice to prevent unjust enrichment. The latter category of equitable lien is most frequently impressed where a plaintiff has advanced money for the purchase or improvement of property, title to which is held by another.").

C. Did the Court Misunderstand Material Facts?

***4** SIGA's Motion does not suggest that the Court misapprehended any fact in holding SIGA liable for breach of its contractual obligation to negotiate in good faith or under the doctrine of promissory estoppel.[FN35] Rather, SIGA asserts that the Court misunderstood certain facts relevant to the relief it provided. As mentioned above, the Court adopted a two-step approach to determine the terms of the equitable payment stream it ordered: the Court, first, derived a responsible estimate of PharmAthene's lost expectancy caused by SIGA's failure to negotiate in good faith and, second, provided a remedy that reasonably compensates for that lost expectancy. Thus, the ultimate remedy depends on the Court's predicate determination that, but for SIGA's bad faith negotiations, the parties would have consummated a license agreement for ST–246 on terms no less favorable to PharmAthene than a one-time $40 million payment by PharmAthene to SIGA in exchange for a pure 50/50 split on all net profits derived from ST–246 for a period of at least ten years. SIGA asserts that reargument is necessary because the Court misapprehended the record in finding that either party would have agreed to a license agreement providing for a pure 50/50 profit split in exchange for a one-time payment of $40 million.[FN36]

FN35. Def.'s Mot. 2 n. 1.

FN36. SIGA's Motion does not address the ten-year term.

As the trier of fact, the Court evaluates testimony, weighs credibility, and determines what inferences to draw from the evidence adduced at trial. [FN37] In terms of an appropriate remedy for PharmAthene's lost expectancy, the evidence

showed several things. First, at all stages of negotiation, the parties structured the prospective license agreement as some combination of payments from PharmAthene to SIGA and some form of revenue sharing between the parties, whether as royalties on sales or a 50/50 profit split, for PharmAthene's obtaining control of ST–246 and any related patents. Thus, in the September 22 Opinion, the Court inferred that this basic structure probably would not have changed had the parties negotiated in good faith.

FN37. *See Hudak v. Procek,* 806 A.2d 140, 153 (Del.2002).

Second, the Court credited the testimony of David Wright, PharmAthene's CEO, that PharmAthene was willing to consider deal terms that varied from those contained in the LATS.[FN38] In that regard, the Court found that "one such variation PharmAthene would have accepted is the use of a 50/50 profit split," [FN39] even though the evidence on that point was conflicting. On the one hand, Eric Richman, PharmAthene's VP of Business Development and Strategies, testified that PharmAthene effectively offered a 50/50 profit split in lieu of royalty payments, and PharmAthene's counsel, Elliot Olstein, confirmed to SIGA in a letter dated November 30, 2006, that PharmAthene was "willing to consider" such a profit split. On the other hand, by early December, both parties had begun to dig their heels in, and Olstein wrote to his counterpart at SIGA on December 6, 2006, that PharmAthene had not indicated that it was prepared to accept a 50/50 proposal, but continued to be "willing to consider" such an amendment to the LATS. Upon considering all the evidence, I concluded in the September 22 Opinion that, had the parties engaged in good faith negotations, PharmAthene would have accepted the use of a 50/50 profit split.[FN40] Nothing in SIGA's Motion indicates that I misapprehended any fact material to that conclusion.

FN38. September 22 Opinion, 2011 WL 4390726, at *38 & n. 227.

FN39. *Id.* at *38 (footnote omitted).

FN40. *Id.* at *38 & n. 228.

***5** Additionally, the Court inferred that PharmAthene would have agreed to increase the aggregate amount of payments to SIGA from the $16 million provided for in the LATS to $40 million. As to that inference, the Court credited Richman's testimony that PharmAthene was willing to consider increasing its aggregate payments [FN41] in response to SIGA's suggestion at the November 6, 2006 meeting that ST–246's interim success warranted "an up-front payment of 40 to $45 million or more...." [FN42] Furthermore, ST–246's interim success corresponded to a roughly threefold increase in the parties' projections of the market for ST–246. [FN43] On those grounds, the Court inferred that PharmAthene would have agreed to increase the aggregate amount of payments to SIGA by a corresponding multiple, from $16 million to $40 or $45 million. [FN44] Accordingly, SIGA also has failed to show that the Court misunderstood any material fact regarding the *amount* of payments that PharmAthene would have agreed to make to SIGA in exchange for a 50/50 profit split.

FN41. T. Tr. 214–15.

FN42. T. Tr.2084 (Fasman). As discussed *infra,* the Court recognized the possibility for disagreement as to the meanings of the references to "upfront" and "aggregate" payments in this context, but found that any distinction between the two terms was immaterial for purposes of its remedies analysis.

FN43. Relying on JTX 123, SIGA argues that there is no record basis to find that PharmAthene's projections had increased. Def.'s Mot. 10. JTX 123 is an email dated November 14, 2006, forwarding PharmAthene's then-current revenue projections for ST–246. Two weeks *later,* on November 28, 2006, SIGA informed PharmA-

> thene that those projections were stale and that SIGA now valued the drug at around $3 to $5 billion, as opposed to the $1 billion to $1.2 billion projections the parties had assumed when negotiating the LATS in December 2005. T. Tr. 228 (Richman); JTX 450. This evidence amply supports the inference that PharmAthene understood the market potential for ST–246 had changed because, among other things, SIGA had apprised PharmAthene of that fact.
>
> FN44. September 22 Opinion. 2011 WL 4390726, at *40 & n. 237.

A third reason supporting the Court's conclusion was its determination that SIGA also would have been amenable to a 50/50 deal together with the equivalent of a $40 million additional payment, especially if, contrary to the LATS, it were to maintain control of ST–246 and the patent rights. To support that determination, the Court relied on an internal presentation prepared by SIGA's controller, Ayelet Dugary. That presentation, apparently prepared for the private use of those negotiating directly with PharmAthene, concluded that SIGA's past and future costs to develop ST–246 were likely to total just under $40 million, thus "supporting an up-front license fee of $40 million[ ] to buy into a 50% participation in future profits from the product." [FN45]

FN45. JTX 437 Attach, at 2.

SIGA further contends in its Motion that there is no basis in the record to conclude that Dugary or Fasman employed the term "up-front license fee" to encompass the additional deferred license fee and milestone payments provided for in the LATS and, therefore, that SIGA would not have agreed to a license agreement providing for only a one-time payment of $40 million.[FN46] SIGA, therefore, disagrees with this Court's findings, but that provides no basis for reargument under Rule 59(f). In the September 22 Opinion, the Court recited the material facts and explained the inferences it drew from them, stating:

> FN46. Def.'s Mot. 9.

> Although Dugary used the term "up-front license fee," the weight of the evidence convinces me that she used that term loosely to include all the non-royalty payments mentioned in the LATS, *i.e* ., the upfront licensee fee, the deferred license fee, and milestone payments. In late 2005, when negotiations for the LATS first began, SIGA [with input from Dugary] estimated that it needed approximately $16 million to complete development of ST–246. After active negotiations, the LATS provided SIGA an aggregate of $16 million, apportioned between upfront license fees, deferred license fees, and milestone payments. Dugary's use of the language "past *and future* " ST–246 expenses shows that, by October 2006, SIGA had revised its estimated needs to complete development of ST–246. Just as the LATS fully provided for ST–246's then estimated development costs, the $40 million payment suggested by Dugary would be sufficient to cover all of ST–246's newly estimated development costs. Accordingly, it is reasonable to infer from the evidence that, as of October 2006, SIGA would have considered an aggregate payment of $40 million adequate to support a 50/50 split of future profits from ST–246.

***6** Fasman's statement at the November 6 meeting with PharmAthene that the upfront payment would need to be increased to "$40 to $45 million or more" likely originated from Dugary's October 18 presentation. Had SIGA negotiated in good faith, it would have proposed a transaction consistent with Dugary's presentation: a lump sum payment in an amount sufficient to cover the revised development costs of ST–246, *i.e.,* $39.66 million or more, in exchange for a 50% profit participation without any further license, milestone, or royalty payments.[FN47]

FN47. September 22 Opinion, 2011 WL

4390726, at *40–41 (footnote omitted).

Moreover, if the negotiations had proceeded in accordance with the LATS, as the Bridge Loan and Merger Agreements provided, PharmAthene presumably would have controlled the product and related patents. In fact, through its misconduct, SIGA alone controls those assets. In summary, while SIGA would have weighed the evidence and drawn the inferences differently if it were the trier of fact, it has not shown that the Court's September 22 Opinion was the product of either a misapplication of the law or a misunderstanding of a material fact.

D. Is There Any Basis in Law or Fact for the *Structure* of the Remedy?

Lastly, SIGA argues in its Motion that "there is no basis in law or fact for transforming an actual upfront payment by PharmAthene into a credit against the first $40 million in net profits to SIGA. Such an arrangement leaves PharmAthene without any risk or investment, which was never even contemplated by the parties, let alone agreed upon." [FN48] As a threshold matter, I note that SIGA made essentially this same argument in its post-trial brief. [FN49] On that basis alone, this aspect of its Motion for Reargument must be denied.[FN50] Moreover, it is entirely irrelevant that a PharmAthene representative arguably gave voice to this argument on an investor call *after* the September 22 Opinion was issued.[FN51] Reargument under Rule 59(f) is "only available to re-examine the existing record." [FN52]

FN48. Def.'s Mot. 11.

FN49. Def.'s Post–T. Ans. Br. 69 ("[A] payment stream going from *SIGA to PharmAthene* is the complete opposite of the arrangement contemplated in the January Term Sheet, inexplicably placing PharmAthene in the role of licensor rather than licensee.")

FN50. *See Guzzetta,* 2008 WL 5459249, at *1 (Del.Ch. Dec.22, 2008); *Reserves Dev. LLC v. Severn Sav. Bank, FSB,* 2007 WL 4644708, at *1 (Del.Ch. Dec.31, 2007); *Nevins v. Bryan,* 2006 WL 205064, at *3 (Del.Ch. Jan.20, 2006).

FN51. *See* Def.'s Mot. 11.

FN52. *Reserves Dev. LLC,* 2007 WL 4644708, at *1.

In any event, the Court did address SIGA's argument in the September 22 Opinion. Referring to the equitable remedy imposed, the Court stated:

> The structure is reversed, but *SIGA's wrongdoing necessitates that.* Absent SIGA's failure to negotiate a license agreement in good faith, PharmAthene would have controlled the ST–246 patents and product. Yet, due to its misconduct, SIGA currently controls those items and will in the future. In these circumstances, as in the case of an equitable lien, it is appropriate to recognize PharmAthene's legitimate claim to share in the proceeds of ST–246. [FN53]

FN53. September 22 Opinion, 2011 WL 4390726, at *39 (emphasis added) (footnote omitted). In an accompanying footnote, the Court further explained that:

> For the reasons previously stated, PharmAthene is not entitled to a form of relief that would interfere with SIGA's control of ST–246 or the patents related to it.... Rather, the relief I am ordering will afford PharmAthene an interest in the *proceeds* from the sale of ST–246 products and, conceivably, the related patents. In this sense, SIGA may be correct that the structure of the transaction contemplated by the LATS has been reversed, but it has no equitable basis to complain about such a reversal. Under the LATS, PharmAthene would have enjoyed a significant degree of control over ST–246 and the related patents. Instead, that control, and the benefit likely to

flow from it, will remain with SIGA.

Id. at*39 n. 231.

In addition to the reversed direction of payments, the equitable payment stream differs from a license agreement by shifting some of the risks between the parties,[FN54] but this difference also derives from SIGA's continued control of the ST–246 patents. As PharmAthene's licensing expert opined, a licensee typically "bears the expected cost of development, manufacture and launch (*including payments made to the [licensor*])" but, "[i]n return, ... has control over the pace of development and expenditures required for commercialization." [FN55] That expert opinion supported the Court's determination that the equitable payment stream, though different in certain respects from a license agreement, was appropriate under the circumstances here because SIGA wrongfully deprived PharmAthene of its expectation of a major role in controlling the pace of the ST–246 development and expenditures.[FN56] The Court, therefore, did not misunderstand any material fact in making that determination.

FN54. That is, because a licensee often must incur upfront, sunk costs in the form of payments to the licensor, the licensee bears a risk of loss should the licensed product ultimately prove unprofitable. Here, by contrast, if ST–246 and its related patents fail to generate proceeds, PharmAthene will not suffer the loss of any such sunk costs.

FN55. JTX 489 ¶¶ 21–22 (emphasis ad- ded).

FN56. *See* September 22 Opinion, 2011 WL 4390726, at *42 (citing JTX 489).

***7** Thus, the legal and equitable basis for the structure of the equitable payment stream is the Court's authority to provide relief "as justice and good conscience may require" [FN57] and to remedy in equity what otherwise would amount to unjust enrichment.

FN57. *Lichens Co. v. Standard Commercial Tobacco Co.,* 40 A.2d 447, 452 (Del.Ch.1944).

II. CONCLUSION

For the reasons stated in this Memorandum Opinion, SIGA's Motion for Reargument is denied.

IT IS SO ORDERED.

Del.Ch.,2011.
PharmAthene, Inc. v. SIGA Technologies, Inc.
Not Reported in A.3d, 2011 WL 6392906 (Del.Ch.)

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EXHIBIT E

Not Reported in A.3d, 2012 WL 2146000 (Del.Ch.)
(Cite as: 2012 WL 2146000 (Del.Ch.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware,
New Castle County.
Re: PHARMATHENE, INC.
v.
SIGA TECHNOLOGIES, INC.

Civil Action No. 2627–VCP.
Submitted: Feb. 27, 2012.
Decided: May 31, 2012.

Christopher A. Selzer, Esq., McCarter & English, LLP, Wilmington, DE.

Andre G. Bouchard, Esq., Bouchard Margules & Friedlander, P.A., Wilmington, DE.

Stephen P. Lamb, Esq., Paul Weiss Rifkind Wharton & Garrison LLP, Wilmington, DE.

DONALD F. PARSONS, JR., Vice Chancellor.
*1 Dear Counsel:

The Final Order and Judgment (the "Judgment") implementing the Court's rulings in its post-trial Opinion dated September 22, 2011 (the "Opinion") is being entered concurrently with this Letter Opinion. In January 2012, each party submitted a proposed form of final order implementing the equitable remedy provided for in the Opinion. From those competing forms of final orders and the parties' submissions to the Court thereafter, no less than thirty discrete points of disagreement are apparent. This Letter Opinion indicates briefly the Court's resolution of each of those disputed issues.

Preliminarily, I note that, to the extent the parties' respective proposed orders reflect mutual agreement on a particular term or the desirability of including terms not expressly required by the Opinion, I have attempted to respect the parties' agreement. As to any issue raised by one party but to which the other party did not respond, I have treated the lack of response as indicative of acceptance of the opposing party's position. Regarding the issues that are in dispute, I have included the following terms in the accompanying Judgment, relying on the reasoning set forth in the Opinion in each instance. [FN1]

FN1. For ease of reference, I address the disputed matters in the order in which they were raised in SIGA's letter to the Court dated January 13, 2012. *See* Docket Item ("D.I.") No. 312 (Jan. 13, 2012). All docket items cited in this letter refer to the docket in this action, C.A. No. 2627–VCP.

1. *Calculation of the First $40 Million Setoff.* The Judgment incorporates PharmAthene's proposed language as consistent with the plain language of the Opinion.[FN2]

FN2. *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 WL 4390726, at *42 (Del.Ch. Sept.22, 2011) [hereinafter Opinion] ("once SIGA earns $40 million in net profits or margin from net sales of ST—246, PharmAthene shall be entitled to 50% of all net profits from such sales thereafter").

2. *Product Expenses Incurred Before the Date of the Judgment.* The Court accepts SIGA's contention that Total Product Expenses [FN3] should include all product-related expenses, whenever incurred. The Opinion granted PharmAthene an "equitable payment stream" on "net profits," which implies that actual costs and expenses should be deducted.

FN3. Capitalized terms not otherwise defined in this Letter Opinion have the

meanings ascribed to them in the Judgment and the Opinion.

3. *Treatment of Research & Development Expense.* The Judgment includes SIGA's definition of Research & Development (R & D) Expense within the definition of Total Product Expenses for the same reason stated in Paragraph (2), *viz.*, that the term "net profits" connotes accounting for all costs and expenses necessary to realize those profits. To the extent PharmAthene fears that SIGA will attempt to deduct R & D expenses funded by the U.S. government or some other third party, Paragraph 2(d)(3)(a) of the Judgment addresses that concern.

4. *Worldwide or Territory-by-Territory Approach.* The Judgment adopts a worldwide, ten-year term following the First Commercial Sale for the reasons explicitly indicated in the Opinion.[FN4]

> FN4. *Id.* at *41 ("Because neither party presented evidence regarding specific patents relating to ST—246 or the countries in which such patent coverage exists, I will limit the equitable lien on sales of ST—246 to a term of ten years from ST—246's, or a closely related product's, first commercial sale. Any attempt to expand the term to encompass countries and sales for which patent coverage does not expire until after ten years from the first commercial sale would force this Court into an unacceptably onerous enforcement or supervisory role.").

5. *Other Limitations on Expenses.*

a. *Direct Relationship between R & D Expense and Timing of Product Delivery.* The Court accepts SIGA's definition of R & D Expense as consistent with industry practice, as required by the Opinion. In doing so, the Court agrees with SIGA that PharmAthene's proposal to limit R & D Expense deductions to those "directly related" to Product delivered during the Payment Period would be vague and unduly burdensome to enforce. As to PharmAthene's professed concerns that SIGA will manipulate the accounting of such expenses, PharmAthene's interests are protected by several provisions of the Judgment, including the "outside-funding" clause of Paragraph 2(d)(3), the allocation clause of Paragraph 2(d)(5), and SIGA's obligation under Paragraph 2(g) to act in good faith.

***2** b. *Treatment of "Allocable Overhead."* The Court accepts SIGA's definition of SG & A Expense as more likely to account for all expenses incurred to realize net profits.

c. *Allocation of Common Costs.* Paragraph 2(d)(5) of the Judgment incorporates SIGA's method of allocating common costs, but with slightly different language, as more reasonable than that proposed by PharmAthene.

d. *Treatment of "Costs of Sales."* The Court accepts SIGA's definition of SG & A Expense as more likely to account for all expenses incurred to realize net profits.

e. *Treatment of Noncash Compensation.* SIGA has not controverted Edwards's expert opinion that noncash compensation typically is excluded as a deductible expense for purposes of biopharmaceutical patent licensing transactions. Rather, SIGA argues only that such an exclusion departs from U.S. GAAP. In the context of the relief granted in the Opinion and the potential for manipulating noncash compensation expense here, I find SIGA's position unpersuasive. Accordingly, Paragraph 2(d)(3)(b) of the Judgment preserves the exclusion of noncash compensation from the calculation of Total Product Expenses.

f. *Treatment of "Marketing Costs."* The Court accepts SIGA's definition of R & D Expense, which incorporates PharmAthene's proposed "Marketing Costs" and certain additional items, as better accounting for all expenses incurred to realize net profits. Any legitimate fears PharmAthene may have that SIGA will deduct expenses attributable to SIGA's business generally should

be assuaged by the allocation clause of Paragraph 2(d)(5).

6. *Timing of Sales.* The Judgment adopts PharmAthene's definition of First Commercial Sale, which requires both delivery of Product and receipt of payment. That definition is in accord with industry practice. It also serves the important purposes of (i) defining clearly the events that commence the Payment Period and (ii) doing so in a manner that should eliminate any doubt as to the bona fides of the transaction. As to all other sales after the First Commercial Sale, the Judgment accepts SIGA's definition predicated on U.S. GAAP-based principles for recognition of revenue. The Court takes seriously, however, PharmAthene's concerns that SIGA might structure such sales with terms that serve to delay recognition of revenue and thereby evade the "equitable payment stream" ordered. Accordingly, to buttress the protections afforded PharmAthene by Paragraph 2(g), the Court has supplemented SIGA's proposed definition of Net Sales to align with recognition of revenue under U.S. GAAP by providing that it applies only so long as,

> SIGA employs accrual method accounting under GAAP in good faith and does not structure the terms of Commercial Sales for the purpose of delaying recognition of revenue under GAAP or otherwise avoiding the spirit of its obligations under the "equitable payment stream" ordered in this Final Order and Judgment.

***3** 7. *The Audit Procedure.* The competing proposals reflect a number of disagreements with respect to the audit procedure to be provided for in the Judgment. Accordingly, the Court has imposed the particular terms of the audit procedure based on the Opinion, the areas of sufficient agreement between the parties, and industry custom. As to the competing proposals' related dispute resolution mechanisms (*e.g.*, a prescribed interest rate on any underpayments), however, most of the parties' disagreements do not relate to matters at issue in the litigation or addressed in the Opinion. As such, the Opinion provides no basis for accepting or rejecting specific aspects of such mechanisms that a party may deem desirable. Therefore, the Court has omitted both parties' proposed last sentence to Paragraph 2(b), and Paragraph 2(c) of the Judgment is only as detailed as the Court considers warranted based on practical concerns and certain areas where the competing proposals of the parties reflected near agreement. To the extent the parties consider it advisable to agree to additional or modified procedures, they remain free to do so without the Court's substantive involvement.

8. *Definition of Product.* The Judgment incorporates PharmAthene's proposed definition of Product, except that the Court replaced prong (iv) of that definition with the following language from the LATS: "any other orthopox related small molecule therapeutic product derived from the same family of tricyclononenes that ST–246 was derived from." [FN5]

FN5. JTX 11 at 1.

9. *Treatment of Combination Products.* Combination products were not addressed in the Opinion. Indeed, the proper treatment of them was never raised until SIGA's letter of January 13, 2012, after which the parties failed to agree on a mutually acceptable approach. Accordingly, the Judgment omits any reference to combination products. As with the audit procedures, the parties remain free to make separate provision for the treatment of combination products without the Court's involvement.

10. *Additional Disputes Identified in SIGA's January 13, 2012 Letter.*

a. *Timing of Reports & Payments.* Paragraph 2(c) of the Judgment requires SIGA to send quarterly reports and payments to PharmAthene within sixty days of the end of each calendar quarter.

b. *Treatment of Disposition Transactions.* The Opinion expressly required

> the parties [to] include in the definition of "net sales," or elsewhere in the proposed judgment, proceeds from any dispositions of the intellectual property rights to ST—246 within the specified term (*e.g.*, should SIGA license, assign, or otherwise transfer any such rights to ST—246 to a third party). To the extent the parties cannot agree, the Court will impose the required terms in accordance with industry practice.[FN6]
>
> FN6. Opinion, 2011 WL 4390726, at *42 n. 250.

Neither party's proposed treatment of such transactions was satisfactory to the Court.

PharmAthene's proposed definition arguably would entitle it to receive half of all proceeds from any transaction in which SIGA's rights in ST—246 were disposed of, regardless of whether that transaction involved additional elements of exchange. For example, if SIGA agreed to sell all or substantially all of its assets, PharmAthene's proposed definition would entitle it to half of all these sale proceeds. Additionally, PharmAthene's proposed definition apparently would entitle it to receive otherwise ordinary Net Profits beyond the end of the ten-year "equitable payment stream." By including "licenses" within its definition of a disposition transaction and providing that PharmAthene would receive one half of "all proceeds ... paid or to be paid (*whenever that shall occur*) as a result of the Disposition Transaction," [FN7] PharmAthene could claim the right to receive running royalty payments on sales made after the expiration of the "equitable payment stream."

> FN7. D.I. No. 308, at 5 (Jan. 10, 2012).

*4 I also consider SIGA's proposed treatment of disposition transactions to be problematic. SIGA incorporated disposition transactions within its definition of Net Sales, which are defined by the recognition of revenue under U.S. GAAP. SIGA's approach, therefore, would exclude all proceeds from extraordinary transactions.[FN8] Thus, for example, SIGA's proposed treatment would capture running royalty payments under a license agreement, but not a sale or assignment of the patent itself.

> FN8. *See* Financial Accounting Standards Board, Statement of Financial Accounting Concepts No. 6, ¶¶ 78–79, 82, 84–88 (2008) (defining revenues as "inflows or other enhancements of assets ... from ... *activities that constitute the entity's ongoing major or central operations* " and in contrast to gains, which, though similar to revenues, "result from incidental or peripheral transactions" (emphasis added)), *available at* http://www.fasb.org (follow "Standards, Concept Statements" hyperlink; then follow "Concepts Statement No. 6 [As Amended]" hyperlink).

The Court, therefore, has provided its own treatment of disposition transactions in Paragraph 2(e) of the Judgment. That Paragraph, together with the Court's definitions of Disposition Transaction and Disposition Transaction Proceeds, provides that (1) running royalty payments from licenses of Product-related intellectual property shall be treated as Net Sales, and PharmAthene shall have no entitlement to share in such revenues after the Payment Period expires, but (2) PharmAthene shall be entitled to share in the proceeds of any other extraordinary disposition of Product (to the extent such proceeds are reasonably allocable to Product, as opposed to other elements of exchange) that occurs before or during the Payment Period, even if the payment to SIGA of such proceeds occurs after the Payment Period expires.

c. *Treatment of Foreign Currency Transactions.* SIGA proposed the inclusion of an express provision for the treatment of foreign currency transactions. PharmAthene did not object to that concept or the proposed language. Accordingly, I have included such a provision in the Judgment, but I modified SIGA's language slightly so that

the provision applies equally to the Court's newly-added definition of Disposition Transaction Proceeds.

d. *Timing of SIGA's Obligation to Pay Attorneys' Fees.* Although they have suggested different due dates, both PharmAthene and SIGA proposed a date certain for SIGA to make payment to PharmAthene for whatever attorneys' fees, expenses, and costs are awarded. Consistent with this Court's usual practice, however, the Judgment does not prescribe a specific due date for the payment of those sums. Instead, all sums awarded pursuant to Paragraph 3 of the Judgment shall accrue post-Judgment interest at the legal rate, currently 5.75% (and subject to change with any changes to the Federal Reserve Discount Rate), until SIGA makes the requisite payment. In this regard, the Court inserted a new Paragraph 5 directing the Prothonotary of the Superior Court to enter the Judgment to the extent it calls for the payment of a sum of money, in accordance with 10 *Del. C.* § 4734.

e. *Treatment of BARDA Line Item Number 13.* Based on the record before me, it appears that any money due to or received by SIGA under line item number 13 of SIGA's BARDA contract would reflect reimbursement of an expense rather than sales proceeds. Accordingly, the Judgment excludes any such money from the definition of Net Sales.

11. *Additional Disputed Issues Regarding the Equitable Payment Stream.* [FN9]

FN9. The following issues were raised for the first time in PharmAthene's letter to the Court dated January 26, 2012. D.I. No. 315, at 15–16 (Jan. 26, 2012).

***5** a. *Patent Enforcement Suits.* The Judgment provides for the treatment of (1) Patent Preparation Fees as a deduction from Total Product Expenses and (2) "all amounts recovered as a result of Product-related patent or trademark infringement suits, claims or actions or settlements thereof" as a component of Net Profits. The Court explicitly included such recovery amounts within the definition of Net Profits to avoid any confusion regarding whether they would qualify as recognized revenue under GAAP.[FN10]

FN10. *See* note 8, *supra.*

b. *Treatment of Government–Funded Drug Trial Expenses.* While the definition of R & D Expense includes "government-funded trial expenses of $10.2 million," Paragraph 2(d)(3)(a) states explicitly that Total Product Expenses shall not include as a cost "any item paid for, funded or reimbursed, whether directly or indirectly, by the U.S. or a foreign government or any other customer or Third Party." To avoid any potential conflict between these provisions, the Court has added an express clause subordinating the definition of R & D Expense to Paragraph 2(d)(3)(a).

c. *References to Constructive Trust and Equitable Lien.* The Court replaced all references to a "constructive trust and equitable lien" in segments drawn from PharmAthene's proposal with "an equitable remedy in the form of an 'equitable payment stream.' " This revision comports with both the Opinion [FN11] and the later Memorandum Opinion denying SIGA's motion for reargument.[FN12]

FN11. *E.g.,* Opinion, 2011 WL 4390726, at *38 (Relief "in the form of an equitable payment stream *akin* to a constructive trust or an equitable lien on a share of the proceeds from ST—246 deserves serious consideration." (emphasis added)).

FN12. *PharmAthene, Inc. v. SIGA Techs., Inc.,* 2011 WL 6392906, at *3 (Del.Ch. Dec.16, 2011) ("this Court enjoys remedial flexibility to depart from strict application of the ordinary forms of relief where circumstances require" and "the Court found

> the underlying purposes of a constructive trust and equitable lien applicable to the circumstances of this case and endeavored to tailor those remedies ... in the form of an equitable payment stream").

d. *Singular or Plural Form of "Deduction."* Paragraph 2(b) employs the plural word "deductions," consistent with the corresponding language from the Opinion. [FN13]

> FN13. Opinion, 2011 WL 4390726, at *42 ("SIGA shall be required to keep records ... showing any *deductions* from such sales or dispositions in deriving 'net sales' " (emphasis added)).

e. *Other Obligations.* Paragraph 2(g) clarifies that the terms of the Judgment "apply to SIGA's heirs, assigns and successors-in-interest." In all other respects, it sufficiently reflects SIGA's continuing obligation to act in good faith.

f. *Continuing Jurisdiction of the Court.* The Judgment omits any reference to the Court's continuing jurisdiction, except to the extent that it provides for the Prothonotary to enter the Judgment in accordance with 10 *Del. C.* § 4734.

12. *Amount of Attorneys' Fees Awarded.*

a. *Pre–Filing Fees.* In response to SIGA's initial objection, PharmAthene conditionally waived its request to recover a portion of the $33,341.79 in attorneys' fees it incurred before the Complaint was filed on December 20, 2006. The condition was that no hearing be held on this issue.[FN14] Because no hearing was held regarding the form of Judgment, the condition was satisfied and such attorneys' fees are excluded.

> FN14. PharmAthene's Resp. to SIGA's Opp'n to Certain Costs & Att'ys' Fees, D.I. No. 315, ¶ 9 (Jan. 26, 2012).

b. *Post–Opinion Fees.* Over SIGA's objection, the Court has included 100% of PharmAthene's post-Opinion fees in the Judgment. All of these fees relate exclusively to claims on which PharmAthene prevailed at trial and "in [some] way relate to the inaccuracy, breach of or default under any representations, warranties or covenants" under the Bridge Loan Agreement.[FN15]

> FN15. JTX 36 § 7.6.

***6** c. *McGuire Woods Fees.* As SIGA noted in its submissions, the record does not disclose the involvement of any attorney associated with McGuire Woods in the provision of legal advice or services to PharmAthene in connection with this litigation, and PharmAthene provided no documentation substantiating any fees it incurred from McGuire Woods. Furthermore, the Court declines PharmAthene's invitation to inspect *in camera* more detailed billing records because any further delay in the entry of Judgment here would be untenable. Because PharmAthene failed to carry its burden to show that McGuire Woods performed reimbursable services for it in connection with this litigation, the Court concludes that an award of any attorneys' fees for such services would be unreasonable. Therefore, the Judgment does not award any fees for work by McGuire Woods.

13. *Costs Awarded Under Rule 54(d).*

a. *Expenses.* The term " 'costs' for purposes of Rule 54(d) ha[s] been deemed to include 'expert witness fees that are covered by statute, court filing fees, and the usual and customary costs incurred in serving of process,' but not 'the expense of computer legal research, transcript fees, miscellaneous expenses (such as travel and meals), and the cost of photocopying.' " [FN16] Thus, as a general matter, SIGA is correct that the customary expenses incurred by PharmAthene's legal professionals ordinarily are not "costs" under Rule 54(d).

> FN16. *Jackson's Ridge Homeowners Ass'n v. May,* 2008 WL 241617, at *1 n. 3 (Del.Ch. Jan.23, 2008) (quoting *Dewey Beach Lions Club v. Longacre,* 2006 WL

2987052, at *1 (Del.Ch. Oct.11, 2006)).

Nevertheless, the Opinion awarded PharmAthene its attorneys' fees and expenses under Section 7.6 of the Bridge Loan Agreement,[FN17] in which the parties agreed to indemnify one another for all "expenses of whatever kind or nature ... including, without limitation, counsel and consultant fees *and expenses* ... in any way related to the inaccuracy, breach of or default under any representations, warranties or covenants" made in that Agreement.[FN18] Thus, subject to the one-third limitation imposed by the Court, PharmAthene has a right to both attorneys' fees and expenses. PharmAthene's misuse of nomenclature notwithstanding, the Judgment provides for SIGA to pay (a) one-third of PharmAthene's attorneys' fees and expenses, collectively, up to the date of the Opinion and (b) 100% of PharmAthene's attorneys' fees and expenses, collectively, through the date of the Judgment. Consistent with Paragraph 12(a) of this Letter Opinion, however, all expenses incurred before December 20, 2006 are excluded from the amount awarded.

FN17. Opinion, 2011 WL 4390726, at *44 ("Based on the plain meanings of SIGA's obligations under ... the Bridge Loan Agreement ... I also conclude that PharmAthene is entitled to recover its attorneys' fees *and expenses* in this action related to SIGA's breach." (emphasis ad- ded)).

FN18. JTX 36 § 7.6 (emphasis added).

b. *TrialGraphix Fees.* PharmAthene has not identified, nor is the Court aware of, any precedents holding that expenses paid to trial consulting firms fall within the narrow scope of "costs" under Rule 54(d). Therefore, the Court declines to treat the expenses PharmAthene incurred in connection with its retention of TrialGraphix as taxable "costs" under that Rule. Nevertheless, as just discussed, Section 7.6 of the Bridge Loan Agreement entitles PharmAthene to recover, among other things, "consultant fees and expenses." Hence, the Judgment accounts for the contested TrialGraphix fees and expenses as a component of the broader amount of attorneys' fees and expenses awarded to PharmAthene. Because PharmAthene incurred these costs before the date of the Opinion, however, only one-third of the total amount invoiced is recoverable.

*7 c. *Other "Costs."* PharmAthene identified only three categories of "costs" for purposes of Rule 54(d): those paid to (1) its experts, (2) its attorneys, and (3) TrialGraphix. There is no dispute as to the amount of experts' fees that PharmAthene may recover. Moreover, as discussed above, the Court has based any award for amounts paid to attorneys and TrialGraphix on PharmAthene's contractual entitlement to such amounts, not on Rule 54. Because PharmAthene did not submit evidence of any other amounts, the Court assumes that all the costs PharmAthene could have recovered under Rule 54(d) are included within those three general categories. In any case, the Court lacks an evidentiary basis to award any other costs typically taxed under Rule 54(d) and, therefore, makes no further provision for costs in the Judgment.

The Final Order and Judgment reflecting the rulings in this Letter Opinion, the Opinion, and the Memorandum Opinion is being entered concurrently herewith.

Sincerely,

/s/ Donald F. Parsons, Jr.

Donald F. Parsons, Jr.

Vice Chancellor

Del.Ch.,2012.
PharmAthene, Inc. v. SIGA Technologies, Inc.
Not Reported in A.3d, 2012 WL 2146000 (Del.Ch.)

END OF DOCUMENT

EXHIBIT F

Not Reported in A.3d, 2012 WL 2308180 (Del.Ch.)
(Cite as: 2012 WL 2308180 (Del.Ch.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.
PHARMATHENE, INC., a Delaware corporation, Plaintiff,
v.
SIGA TECHNOLOGIES, INC., a Delaware corporation, Defendant.

C.A. No. 2627–VCP.
May 31, 2012.

FINAL ORDER AND JUDGMENT

DONALD F. PARSONS, JR., Vice Chancellor.

*1 WHEREAS, on December 20, 2006, plaintiff PharmAthene, Inc. ("PharmAthene") filed the above-captioned action (the "Action") against defendant SIGA Technologies, Inc. ("SIGA");

WHEREAS, on May 5, 2009, PharmAthene filed an Amended Complaint containing the following seven claims for relief: Specific Performance (Count One), Declaratory Relief (Count Two), Breach of Contract (Count Three), Breach of Contract (Count Four), Breach of Express Covenants (Count Five), Promissory Estoppel (Count Six), and Unjust Enrichment (Count Seven);

WHEREAS, on May 18, 2009, SIGA filed a Counterclaim against PharmAthene for Breach of Contractual Obligation to Negotiate in Good Faith (the "Counterclaim");

WHEREAS, on September 22, 2011, the Court issued a post-trial opinion (the "Opinion");

WHEREAS, on October 4, 2011, SIGA filed a Motion for Reargument;

WHEREAS, on October 16, 2011, the Court denied SIGA's Motion for Reargument (the "Reargument Order");

WHEREAS, the Opinion directed "[c]ounsel for PharmAthene [to] submit, on notice, a proposed form of final judgment reflecting the[ ] rulings" of the Opinion, *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 WL 4390726, at *45 (Del. Ch. Sept. 22, 2011), and, in that regard, further indicated that, "[t]o the extent the parties cannot agree, the Court will impose the required terms," *id.* at *43 n. 250;

WHEREAS, the parties could not agree on a proposed form of order and, therefore, in January and February 2012, the parties filed several letters with the Court setting forth their points of disagreement and attaching their respective proposals; and

WHEREAS, the Court having considered those letters and proposals and having denied SIGA's request for additional argument on these matters;

IT IS HEREBY FINALLY ORDERED, ADJUDGED AND DECREED, for the reasons stated in the Opinion, the Reargument Order, and the letter to counsel filed contemporaneously with this Final Order and Judgment, that:

1. Judgment is entered in favor of SIGA on Counts One through Four and Count Seven of the Amended Complaint, each of which is dismissed with prejudice. Judgment is entered in favor of PharmAthene on SIGA's Counterclaim, which is dismissed with prejudice.

2. Judgment is entered in favor of PharmAthene on Counts Five and Six of the Amended Complaint. PharmAthene is granted an equitable remedy in the form of an "equitable payment stream" to the extent set forth in and in accordance with the other terms and conditions of this Final Order and Judgment, as follows:

a. Once SIGA earns $40 million in Net Profits, [FN1] PharmAthene shall be paid fifty percent

(50%) of all Net Profits for a period from entry of this Final Order and Judgment until expiration of ten (10) years following the "First Commercial Sale" (the "Payment Period") as determined in accordance with this Final Order and Judgment, unless the Payment Period is terminated earlier as set forth below under Paragraph 2(e). For purposes of calculating the length of the Payment Period, "First Commercial Sale" shall be deemed to occur following initial delivery of and payment for Product.

FN1. Certain capitalized terms used in this Final Order and Judgment and not otherwise defined herein are defined as set forth on Exhibit A annexed to this Final Order and Judgment.

***2** b. SIGA shall keep records showing the sales or other dispositions of Product in an Accounting Period and showing any deductions from such sales or dispositions in deriving Net Sales, Net Profits and Disposition Transaction Proceeds in sufficient detail to enable the amount due to PharmAthene under this Final Order and Judgment to be determined. All such records shall be complete and accurate, and PharmAthene shall be entitled to examine those records on an annual basis to the extent necessary to verify the payments, if any, to which it is entitled under this Final Order and Judgment as follows: PharmAthene, acting solely through its outside legal counsel and an independent certified public accounting firm selected by PharmAthene, shall have the right to examine such records in the location(s) where such records are maintained during regular business hours upon reasonable notice (which shall be no less than seven (7) calendar days) for Accounting Periods ending within twenty-four (24) months of the date of the request for examination. The outside legal counsel and independent certified public accounting firm (i) shall hold information learned in the course of the examination in confidence other than as otherwise may be required by law or solely as necessary to enforce this Final Order and Judgment and (ii) may deliver a report to, and discuss the results thereof with, PharmAthene stating whether any report or payment from SIGA to PharmAthene rendered pursuant to this Final Order and Judgment is fairly stated or misstated and, if misstated, the fairly stated amount of Net Sales, Cost of Goods, Research & Development Expense, Selling, General & Administrative Expense, Patent Preparation Fees, Disposition Transaction Proceeds and Net Profits, along with a detailed explanation of the reasons for the misstatement.

c. Within sixty (60) days following the end of each calendar quarter, SIGA shall send to PharmAthene a report detailing the amount of Net Sales, Cost of Goods, Research & Development Expense, Selling, General & Administrative Expense, Patent Preparation Fees and Disposition Transaction Proceeds and the calculation of the Net Profits, along with any payment that may be required pursuant to this Paragraph 2. If Net Profits are negative in any quarter, such negative amount shall be applied to future periods in the manner set forth in this Final Order and Judgment, but in no event will PharmAthene be obligated to make any payment to SIGA (irrespective of whether such negative Net Profits are offset in full or part in future periods). If it is determined that SIGA underpaid or overpaid PharmAthene for the preceding quarter, the amounts payable in such current quarter shall be adjusted dollar for dollar to reflect such prior over- or under-payment. All payments by SIGA to PharmAthene pursuant to this Final Order and Judgment shall be made in U.S. dollars in immediately available funds by wire transfer to the account designated from time to time by PharmAthene.

***3** d. In calculating Total Product Expenses, the following principles shall apply: (1) Costs included in one category or any component of a category shall not be included in any other category or component (*i.e.*, no duplication of costs); (2) No profit or other mark-up by any Af-

filiate providing Product or services related to Product shall be included; (3) The following costs shall not be included: (a) any item paid for, funded or reimbursed, whether directly or indirectly, by the U.S. or a foreign government or any other customer or Third Party; (b) noncash compensation (*e.g.*, stock option or other equity-related expense) to any person or entity; (c) national, state and local taxes on income; (4) Unless otherwise expressly noted in this Final Order and Judgment, the amounts used to calculate Net Sales or Net Profits shall be consistent with the amounts set forth in SIGA's internal financial records that are used to prepare its GAAP-based financial statements; (5) To the extent that any item of SIGA's costs or expenses is incurred generally in SIGA's business or is otherwise not 100% directly related to the development, manufacture, marketing, distribution, storage, sale or regulatory approval of Product or is not otherwise 100% directly associated with Product, then SIGA shall allocate to Total Product Expenses a portion of such item based on the size of the Product business in relation to the entirety of all of SIGA's research, development and commercial programs.

e. The following terms shall apply whenever there is a Disposition Transaction, which by definition must occur before the expiration of the Payment Period: (1) SIGA shall provide PharmAthene with prompt written notice of any Disposition Transaction, including a detailed description of the transaction; (2) Subject to clause (4) of this Paragraph 2(e), PharmAthene shall receive one-half of the Disposition Transaction Proceeds within sixty (60) days following SIGA's receipt thereof, regardless of whether payment to SIGA of the Disposition Transactions Proceeds occurs before or after expiration of the Payment Period; (3) Subject to clause (4) of this Paragraph 2(e), the Payment Period shall end with respect to those rights subject to the Disposition Transaction, but only those rights, upon the closing of such transaction; (4) In the case of any exclusive or nonexclusive license, any running royalty payments that are a function of sales within specific annual or shorter periods and are due to SIGA promptly after the end of such period shall be treated as a component of Net Sales, and PharmAthene's rights under this Final Order and Judgment to share in the revenue of such running royalty payments shall not extend beyond or be terminated prior to the expiration of the Payment Period.

f. The amounts used to calculate Disposition Transaction Proceeds, Net Sales or Net Profits, if recognized by SIGA in a foreign currency, shall be converted to U.S. dollars in a manner consistent with SIGA's normal practices as used in connection with its GAAP-based financial statements, provided that SIGA's records shall include the source and method of any currency conversion used in order to facilitate the examination set forth in Paragraph 2(b).

***4** g. This Final Order and Judgment shall apply to SIGA's heirs, assigns and successors-in-interest. In carrying out its obligations under this Final Order and Judgment, SIGA shall at all times act in good faith and shall not take any action whose primary purpose is to reduce any amount otherwise payable to PharmAthene under this Final Order and Judgment. All Net Sales and Disposition Transactions shall be the result of good-faith, arms' length transactions and shall not be based on any artificially depressed selling or transfer price.

3. PharmAthene is awarded certain fees, expenses, and costs as follows and to the extent set forth and supported pursuant to Court of Chancery Rule 88:(a) one-third of its reasonable attorneys' fees and expenses up to the date of the Opinion totaling $1,854,079.43; (b) 100% of its is reasonable attorneys' fees and expenses from the date of the Opinion through the date of this Final Order and Judgment totaling $154,482.58; (c) one-third of its expert witness costs totaling $402,148.31; and (d) post-Judgment interest on all of the amounts identi-

fied in this Paragraph 3, which collectively total $2,410,710.32, at the legal rate (5% plus the current Federal Reserve Discount Rate of 0.75% and as adjusted with future changes in the Federal Reserve Discount Rate, if any) from the date of this Final Order and Judgment until the award of such fees, expenses, and costs is satisfied.

4. Entry of this Final Order and Judgment is without prejudice to the rights of any party to appeal any of the rulings of this Court since the inception of the Action, and all such rights are expressly reserved.

5. To the extent that Paragraph 3 hereof calls for the payment of a sum of money, the Register in Chancery shall forthwith forward to the Prothonotary of the Superior Court, in accordance with 10 *Del. C.* § 4734, a certified copy of this Final Order and Judgment to be entered by the Prothonotary in the same amount and form and in the same books and indices as judgments and orders entered in the Superior Court.

Exhibit A to Final Order and Judgment in *PharmAthene, Inc. v. SIGA Technologies, Inc.,* Civil Action No. 2627–VCP Court of Chancery of the State of Delaware

Certain Definitions

For purposes of this Final Order and Judgment only, and without binding either party to this Action in any other matter, the capitalized terms used in this Exhibit A shall have the following meanings.

"Accounting Period": a calendar quarter, or (a) for the first partial quarter, the period beginning on the first day of the Payment Period and ending on the last day of the calendar quarter in which such first day occurs, or (b) for the last partial quarter, the period beginning on the first day of the calendar quarter in which the end of the Payment Period occurs and ending at such end.

"Affiliate": each natural or juridical person (i) whose financial results are or would be (to the extent that SIGA ceases to be a registered issuer of securities in the United States) consolidated with those of SIGA under Regulation S–X of the rules of the U.S. Securities and Exchange Commission promulgated under the Securities Exchange Act of 1934, as amended, or any equivalent future rule and (ii) to the extent not covered in clause (i), directly or indirectly controlling, controlled by or under direct or indirect common control with SIGA.

***5 "cGMP":** "current good manufacturing practices" within the meaning of regulations promulgated by the U.S. Food and Drug Administration under the federal Food, Drug and Cosmetics Act.

"Commercial Sales": all sales or other dispositions of Product, other than Disposition Transactions, by SIGA or its Affiliates to any Third Party worldwide, including, without limitation, any federal, state, local or foreign government entity.

"Cost of Goods": the total of: (a) the aggregate of internal and external costs incurred by SIGA or its Affiliates to manufacture Product (including, without limitation, (x) the costs of any drug delivery device sold, or, as applicable, reasonably intended to be sold, for a single price with Product, (y) the cost to manufacture Product in accordance with applicable standards, such as cGMP, and (z) the costs of any and all material and equipment used in the manufacturing process), calculated as follows: (i) to the extent that such expenses are internal, the actual direct material, direct labor and direct other costs for, plus manufacturing overhead reasonably allocable to, manufacturing (or directing the manufacture of) such Product (which may include facilities' start-up expenses, equipment costs, the expense of audits, all directly incurred manufacturing variances, the costs of failed batches of Product, manufacturing administrative and facilities costs (including depreciation) and manufacturing subcontracting costs); (ii) to the extent such expenses are external, the amount paid to Third Parties for such activities (including, without limitation, costs of the type enumerated in subsection (i) immediately above and, to the extent included in the fees

charged by such Third Parties, costs for failed batches of Product or any ingredient or aspect of the manufacture of Product) and the actual direct labor or direct other expenses, plus reasonably allocated costs, incurred internally in managing and overseeing the relationships with the Third Parties; and (iii) to the extent that cGMP or any foreign equivalent rule requires quality assurance testing during or following manufacture or in order to validate compliance with cGMP or Product regulatory approval requirements, the costs of such testing; (b) royalties, license or other fees paid or payable by SIGA or its Affiliates to Third Parties after the date of this Final Order and Judgment to license or acquire patent or other intellectual property rights necessary or appropriate to permit the manufacture, distribution or sale of Product and all overhead allocable thereto; (c) amounts paid by or allocable to SIGA for the handling, transportation or delivery of Product to Third Parties or customers; and (d) costs captured for the destruction of Product or raw or intermediate materials used in the manufacture of Product that cannot be used anymore due to expiration of shelf-life, spoilage in the production process or transportation mishaps.

"Cumulative Measuring Period": for any Accounting Period, the period commencing on the date in 2004 on which SIGA acquired from Viropharma, Inc. certain rights relating to Product and ending on the last day of such Accounting Period.

***6 "Disposition Transaction":** prior to expiration of the Payment Period, any agreement to assign, sell or otherwise transfer or encumber SIGA's rights, in whole or in part, to make, use, sell, commercialize or otherwise exploit the Product (including any patents or other intellectual property related thereto) for any reason whatsoever, whether by way of merger, license, asset sale, corporate reorganization or otherwise.

"Disposition Transaction Proceeds": for any Disposition Transaction, the proceeds and other consideration paid or to be paid to SIGA and its Affiliates, subject to the following limitations: (a) If a Disposition Transaction occurs as part of a larger transaction (*e.g.*, if SIGA assigns its rights in Product as part of a sale of all or substantially all of its assets), the Disposition Transaction Proceeds thereof shall include only those proceeds and other consideration reasonably allocable to the sale, assignment, or other transfer of SIGA's rights in Product (including any patents or other intellectual property related thereto); (b) In the case of any exclusive or nonexclusive license, Disposition Transaction Proceeds shall not include any running royalty payments that are a function of sales within specific annual or shorter periods and are due to SIGA promptly after the end of such period; such running royalty payments shall be included within the definition of Net Sales, and PharmAthene's right to share therein shall be limited to the Payment Period as provided in Paragraph 2(e)(4) of this Final Order and Judgment.

"Dugary Estimate": the 2006 analysis of expenses prepared by Ayelet Dugary of SIGA and made part of the trial record in this Action.

"Fair Value": the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date.

"GAAP": accounting principles generally accepted in the United States in the relevant Accounting Period, including, without limitation, those principles set forth in the Accounting Standards Codification promulgated from time to time by the Financial Accounting Standards Board (the "ASC"), those principles set forth in applicable accounting regulations or Staff Accounting Bulletins promulgated from time to time by the U.S. Securities and Exchange Commission (the "SEC Rules"), or any set of principles that may supersede the ASC or the SEC Rules.

"Net Profits": in any Accounting Period, (i)(a) the Net Sales of Product in the Cumulative Measuring Period relating to such Accounting Period *plus* (b) all amounts recovered as a result of Product-re-

lated patent or trademark infringement suits, claims or actions or settlements thereof in the Cumulative Measuring Period relating to such Accounting Period *less* (c) the Total Product Expenses in the Cumulative Measuring Period relating to such Accounting Period, each as accrued in accordance with the preparation of SIGA's GAAP-based financial statements using SIGA's books and records, *less* (ii) the sum of the Net Profits with respect to each Accounting Period preceding such Accounting Period as to which such Net Profits were positive; *provided, however,* that any Net Sales or Total Product Expenses eliminated in preparing SIGA's consolidated financial statements as a result of applying the provisions of Accounting Principles Board Opinion No. 18 *The Equity Method of Accounting for Investments In Common Stock* (or any superseding authority) to interactions with entities to which SIGA applies the equity method of accounting shall not be included in the calculation of Net Profits. Net Profits may be positive, zero or negative.

*7 **"Net Sales":** in any Accounting Period, means all revenue recognized in such Accounting Period consistent with the recognition of such revenue during the preparation of SIGA's GAAP-based financial statements (provided that SIGA employs accrual method accounting under GAAP in good faith and does not structure the terms of Commercial Sales for the purpose of delaying recognition of revenue under GAAP or otherwise avoiding the spirit of its obligations under the "equitable payment stream" ordered in this Final Order and Judgment), from (i) Commercial Sales, (ii) the licensing by SIGA of the intellectual property rights to Product (only to the extent not included as a component of Disposition Transaction Proceeds) or (iii) any other disposition by SIGA of the intellectual property rights to Product (only to the extent not included as a component of Disposition Transaction Proceeds), *in all cases less:* (a) all rebates, quantity, trade and cash discounts, and other usual and customary discounts to customers with respect to such Commercial Sales, if any, granted and taken in the ordinary course of business; (b) amounts repaid or credited by reason of rejections or returns of such Product (including returns of such Product by reason of a Product recall or damaged or defective goods); (c) all compulsory payments and rebates, actually paid or deducted, with respect to such Commercial Sales; (d) customs payments, duties, tariffs and other governmental charges, as well as sales, use, excise, inventory, value added, and other taxes (other than taxes based on income), incurred and related to the sale, delivery or use of such Product; (e) retroactive price reductions, discounts, chargebacks, adjustments, rebates, fees, credits, reimbursements or similar payments granted to governmental, quasi-governmental or multi-national institutions (including, without limitation, any governmental healthcare-related agency in any jurisdiction or the World Health Organization), managed health care organizations, healthcare institutions, other buying groups or providers of healthcare or social and welfare systems; or in connection with patient assistance or similar programs, government-mandated rebates, and other types of rebates, cash sale incentives or deductions for items of a nature or substance similar in nature to that of the foregoing deductions in this clause (e); (f) distributor commissions and fees payable to any other person acting as a wholesaler for distribution of such Product, to the extent that they are reasonably incurred; (g) bad debt expense; (h) postage charges, shipping charges (including, without limitation, charges for shipping materials), freight, insurance with respect to handling or transit of Product and other transportation or handling charges incurred in shipping such Product to or for the account of the purchaser; and (i) any item substantially similar in character or substance to any of the foregoing.

For purposes of clarity, and notwithstanding anything to the contrary in this Exhibit A, the following activities shall not be considered Net Sales: (1) disposition of Product for use in animal trials, clinical trials or other experiments primarily intended as to create supporting data for use in seeking or maintaining regulatory approval to sell Product

or other scientific testing required or reasonably useful for further research or development related to such Product, in each case as to which neither SIGA nor its Affiliates receives any revenue or other compensation; (2) disposition of a reasonable amount of Product as samples or as part of a compassionate use, patient assistance, named patient or test marketing program or any similar program, in each case as to which neither SIGA nor its Affiliates receives any revenue or other compensation; and (3) money due to or received by SIGA with respect to contract line item numbers 0007, 0008, 0009, 0010, 0013, 0015, 0016, 0017, 0018, 0019, 0020 and 0021 under BARDA contract no. HHSO100201100001C or any substantially similar items in any future governmental contract.

***8 "Patent Preparation Fees":** costs or expenses of or associated with applying for, issuing, recording rights with respect to, maintaining in force and enforcing or defending patent, invention and trademark rights with respect to Product.

"Payment Period": the period commencing on the date of this Final Order and Judgment and ending on the tenth anniversary of the First Commercial Sale.

"Product": (i) the final drug product under the brand name ST–246®, (ii) the final drug product whose active ingredient has the USAN designation Tecovirimat, (iii) any final drug product chemically derived from the active ingredient that has the USAN designation Tecovirimat, and (iv) any other orthopox related small molecule therapeutic product derived from the same family of tricyclononenes that ST–246 was derived from.

"Research & Development Expense": subject to Paragraph 2(d)(3) of this Final Order and Judgment, all expenses incurred by SIGA or its Affiliates in connection with developing Product or potential substitutes or improvements for Product for sale or supporting directly or indirectly an application for marketing or regulatory approval in any jurisdiction necessary to permit sales of Product in such jurisdiction, including, without limitation, research and development compensation expense, consulting expense, related travel expenses, supply expenses, research and development facility and equipment-related expense to the extent related to Product and payments to Third Parties for development services relating to Product, the $2.5 million cost to acquire the rights to Product from Viropharma, Inc., government-funded trial expenses of $10.2 million as noted in the Dugary Estimate, expenses for the administration of regulatory applications, approvals and compliance, expenses of working with regulatory authorities to address the unusual aspects of biodefense drugs (such as appropriate application of the Animal Rule), expenses of post-marketing studies, patient surveillance (or safety or efficacy monitoring) expenses or related expenses requested by any jurisdiction in connection with any such approval.

"Selling, General & Administrative Expense" or "SG & A": all expenses incurred by SIGA or its Affiliates associated with making, distributing, marketing, promoting or selling Product (including, without limitation, sales force, business development, market research and contract administration expenses; expenses relating to consulting or other services procured in order to facilitate, obtain, maintain or enhance governmental or other institutional purchases of Product; expenses for technical and support areas such as customer service, samples, product management, pricing policy and promotion of Product trials or demonstrations for marketing purposes; and commissions to agents and independent representatives where the commissions are not reductions in sales value) other than such expenses to the extent included in Cost of Goods, Research & Development Expense or Patent Preparation Fees. SG & A includes without limitation expenses incurred in support of making, obtaining from Third Parties, distributing, marketing, promoting or selling Product as a result of or in connection with administrative or corporate management functions relating to: (a) overall business strategy as it relates to Product, (b) finance, (c) human resources,

(d) legal affairs (including, without limitation, (i) the uninsured portion of expenses of avoiding or defending against product liability claims with respect to Product, (ii) the expenses of prosecuting or defending actions other than this Action in order to protect the rights of SIGA or its Affiliates with respect to Product or the intellectual property associated therewith, and (iii) the expenses of negotiating and administering contracts for the development, manufacture or sale of Product), (e) risk management (including, without limitation, the expenses of general liability, product liability, contingent loss insurance, transit and other insurance to the extent related to Product or errors or omissions or business interruption insurance to the extent relating to the manufacture, distribution, marketing or sale of Product), (f) office expense and facility expenses, (g) security, (h) information technology, and (i) impairments of long-lived assets.

*9 **"Third Party"**: any natural or juridical person other than SIGA or any Affiliate.

"Total Product Expenses": subject to Paragraph 2(d) of this Final Order and Judgment, the *sum* of (1) Cost of Goods and direct and allocated (2) Research & Development Expense; (3) Selling, General & Administrative Expense; and (4) Patent Preparation Fees; *provided, however,* that Total Product Expenses shall not include any item of Research & Development Expense, Selling, General & Administrative Expense and Patent Preparation Fees that is both (a) not reflected in the Dugary Estimate and (b) prepaid or reimbursed pursuant to any governmental grant or contract for the development of Product.

Del.Ch.,2012.
Pharmathene, Inc. v. SIGA Technologies, Inc.
Not Reported in A.3d, 2012 WL 2308180 (Del.Ch.)

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