EFiled: May 01 2015 04:40PM EDT
Filing ID 57170215
Case Number 20,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SIGA TECHNOLOGIES, INC., a Delaware Corporation, Defendant Below, Appellant/Cross-Appellee, v. PHARMATHENE, INC., a Delaware Corporation, Plaintiff Below, Appellee/Cross-Appellant.	No. 20, 2015 Appeal from Court of Chancery C.A. No. 2627-VCP

DEFENDANT BELOW, APPELLANT/CROSS-APPELLEE SIGA TECHNOLOGIES, INC.'S REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

Of Counsel:

Walter Rieman
Jaren Janghorbani
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Harold P. Weinberger
Seth F. Schinfeld
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
Stephen P. Lamb (#2053)
Meghan M. Dougherty (#4787)
Matthew D. Stachel (#5419)
500 Delaware Avenue, Suite 200
P.O. Box 32
Wilmington, Delaware 19899-0032
(302) 655-4410

Attorneys for Defendant Below, Appellant/Cross-Appellee SIGA Technologies, Inc.

Dated: May 1, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

In its 55-page brief, PharmAthene completely ignores the seminal issue in this appeal: this Court's clear instruction that an expectation damages award presupposes that damages can be proven with reasonable certainty and no recovery can be had for damages which are "uncertain, contingent, conjectural, or speculative."[1] PharmAthene also completely ignores this Court's clear instruction that "the contract [is] the source of a remedy on the breach of an obligation to negotiate in good faith." PharmAthene writes these rules of Delaware law out of this Court's 2013 Opinion entirely. But as demonstrated in SIGA's Opening Brief, the Court of Chancery's improper rejection of these instructions—and its erroneous belief, on remand, that "I am completely unconstrained, and I could award money damages of whatever number I set"—is the very reason why its revisionist award of expectation damages must be overturned.

First, the Court of Chancery's conclusion in 2011 that expectation damages here are "speculative and too uncertain, contingent, and conjectural" is the law of the case. PharmAthene asserts that the Court of Chancery was correct to disregard its own 2011 post-trial ruling on remand. But the law of the case doctrine does not permit the Court of Chancery to ignore its own prior findings, reverse itself, and award lump-sum expectation damages based on virtually the same record,

[1] *SIGA Techs., Inc.* v. *PharmAthene, Inc.*, 67 A.3d 330, 348, 351 n.99 (Del. 2013) (hereinafter "Sup. Ct. Op.") (citation and internal quotation marks omitted).

supplemented only by cherry-picked evidence of post-trial events that the parties could not reasonably have anticipated at the time of the breach.

Nor, as PharmAthene argues, would correct application of the law of the case "arbitrarily den[y]" PharmAthene its right to appeal the Court of Chancery's 2011 refusal to award expectation damages. To the contrary, PharmAthene could have argued in this appeal that the Court of Chancery's 2011 finding was clear error, but it is not freed from that finding unless and until this Court were to overrule it.

Second, even if law of the case did not apply, the Court of Chancery's 2011 conclusion on a full evidentiary record that expectation damages here are fatally speculative is correct. PharmAthene never contends with the factual record as found by the Court of Chancery in 2011, including, among other things, that "[t]he 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." Instead, PharmAthene recycles claims about the parties' expectations at the time of the breach that the Court of Chancery already heard and rejected.

Third, aware of the infirmity of the Court of Chancery's decision on remand, PharmAthene tries to rewrite Delaware law on expectation damages once again, claiming that "Delaware does not require certainty in the award of damages where a wrong has been proven and injury established." (PharmAthene's Corrected

Answering Brief on Appeal, D.I. 17 ("PA Br."), at 31 (quoting *Beard Research, Inc.* v. *Kates*, 8 A.3d 573, 613 (Del. Ch. Apr. 23, 2010), *aff'd sub nom.*, *ASDI, Inc.* v. *Beard Research, Inc.*, 11 A.3d 749 (Del. 2010).) This is wrong. As the very case PharmAthene cites goes on to make clear, the "Court may not set damages based on mere 'speculation or conjecture' where a plaintiff fails to adequately prove damages," regardless of injury. *Beard Research*, 8 A.3d at 613 (citation omitted); *see Agilent Techs., Inc.* v. *Kirkland*, 2010 WL 610725, at *29 n.271 (Del. Ch. Feb. 18, 2010) (same).

In any event, no shortcut to expectation damages is available under Delaware law. SIGA's breach of its duty to negotiate a commercial contract in good faith did not relieve PharmAthene of its burden to prove expectation damages that are not speculative. To do so would impose an improper punitive remedy on SIGA, and radically expand the availability of expectation damages under Delaware law.

There simply is no "lesser degree of certainty" under Delaware law that applies to PharmAthene's damages claim. *See* Ex. B at 8. The question here is not whether approximate or estimated damages are permitted in the absence of mathematical certainty, but whether damages that were determined by the Court of Chancery to be "speculative and too uncertain, contingent, and conjectural" on a full evidentiary record can nonetheless be awarded now by the same court on remand. SIGA respectfully submits that any award of expectation damages under

Delaware law—let alone a $194 million judgment, nearly as large as the market capitalizations of SIGA and PharmAthene combined, that forced SIGA to seek bankruptcy protection in order to take this appeal—must be proven with "reasonable certainty" and cannot be "uncertain, contingent, conjectural, or speculative." This Court has so held.

Moreover, nothing in PharmAthene's brief provides a justification for the Court of Chancery's arbitrary and selective reliance on post-breach and post-appeal evidence to determine what the parties' expectations were at the time of breach in December 2006. As SIGA showed in its Opening Brief, that post-breach evidence included literally unforeseeable events, such as the award in May 2011, more than four years after the breach, of the BARDA contract. It also included the court-invented fictions that ST-246 sales would begin in 2010 (sales did not begin until 2013) and that the government would acquire nearly 15 million courses of the drug (to date, it has purchased only 1.7 million courses), and the revival of a flawed damages model that the Court of Chancery rejected in its 2011 decision as "inherently speculative."

There is no evidence anywhere in the record that the parties reasonably expected any of these events to occur. Rather, as the Court of Chancery conclusively found in its 2011 decision, "numerous uncertainties" surrounded ST-246 at the time of the breach, rendering any expectation of the parties "inherently speculative." Among other things, at the time of the breach, ST-246 faced

regulatory hurdles with no clear path to approval, and significant research, development and testing still needed to be completed. ST-246's commercial viability was uncertain. These findings are the law of the case, but even if they were not, nothing has occurred in the nearly nine years since the breach to make the parties' expectations as of December 2006 any less speculative.

Finally, PharmAthene's Cross-Appeal fares no better. Despite this Court's clear instruction that "the contract [is] the source of a remedy on the breach of an obligation to negotiate in good faith," PharmAthene asks that, in the event the award of expectation damages is reversed, this case be remanded for either (1) reinstatement of a version of the original, equitable remedy created by the Court of Chancery in 2011 but vacated on appeal, or (2) an award of specific performance. But PharmAthene has an adequate remedy at law. Additionally, specific performance is unavailable because there was never a binding, final contract for the parties to perform, as both this Court and the Court of Chancery have acknowledged, and because the passage of nearly nine years since the breach has made specific performance inappropriate and impossible as a practical matter.

For these reasons, and those set forth below and in SIGA's Opening Brief, the Court should vacate the Court of Chancery's damages award. The loss of a good faith negotiation is simply not a lottery ticket for speculative damages, and this Court should make clear that Delaware is not a forum for litigants hoping to get lucky.

SUMMARY OF ARGUMENT

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

1. Denied. PharmAthene is entitled only to contract damages for its breach of contract claim, and has no remaining equitable claim or other entitlement to equitable relief. Further, there is no basis for awarding a payment stream as a "form" of expectation damages.

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

ARGUMENT

I. The Court of Chancery Erred in Awarding Expectation Damages

A. Standard of Review

The standard of review advocated by PharmAthene is largely incorrect. As a general rule, determinations of fact are reviewed for abuse of discretion, and will not be reversed unless "clearly erroneous." *Reserves Dev. LLC* v. *Crystal Props., LLC*, 986 A.2d 362, 367-68 (Del. 2009). However, here the Court of Chancery made factual findings in 2011 to which it remained bound, and which were correct. The Court of Chancery's revised conclusions on those facts as set forth in its 2014 Remand Opinion should be afforded no deference. Further, the "broad discretion" afforded to the Court of Chancery in determining an equitable remedy is irrelevant here, as this Court has already ruled that PharmAthene has no equitable claim but instead "must look to the contract" for a remedy. Sup. Ct. Op. at 348.

B. The Court of Chancery's Prior Determination That Expectation Damages Are Speculative Is Law of the Case and Thus Binding.

PharmAthene attempts to argue that the Court of Chancery's definitive, non-conditional 2011 ruling that expectation damages here are too speculative is not law of the case, simply because this Court did not previously consider that ruling. (*See* PA Br. at 2-3, 26 n.12.) PharmAthene has it backwards. Under the law of the case doctrine, a trial court's legal conclusions and factual determinations are the law of the case unless and until they are reversed on appeal. *See Cede & Co.* v. *Technicolor, Inc.*, 884 A.2d 26, 38-39 (Del. 2005); *Thorpe* v. *CERBCO, Inc.*, 1997

WL 67833, at *4 (Del. Ch. Feb. 6, 1997), *aff'd*, 703 A.2d 645 (Del. 1997) (TABLE);[2] *see also Zirn* v. *VLI Corp.*, 1994 WL 548938, at *2 (Del. Ch. Sept. 23, 1994) ("[I]t is not the law that on issues not expressly or inferentially disturbed by the appellate court, the trial court needs to or, indeed, is free to open them on remand to renewed consideration. Absent direction to do otherwise the law of the case doctrine commands respect for the prior findings of the court.").

This Court's recent opinion in *Nationwide Emerging Managers, LLC* v. *NorthPointe Holdings, LLC* is instructive. __ A.3d __, 2015 WL 1317705 (Del. Mar. 27, 2015). In *Nationwide*, this Court held that the law of the case doctrine barred the Superior Court's reversal of its earlier determination that certain conduct did not breach a contractual provision. *Id.* at *11. This Court explained that "[u]nder the 'law of the case doctrine,' a court's legal ruling at an earlier stage of proceedings controls later stages of those proceedings, provided the facts underlying the ruling do not change." *Id*. (citation omitted). Because "the Superior Court's earlier conclusion on that point was sound," "the factual basis for the Superior Court's first ruling did not change," and there was no "error or injustice, much less a clear one, stemming from the first ruling that would justify re-consideration," the law of the case barred revisiting the issue. *Id.* at *11-12

[2] PharmAthene's attempts to distinguish *Cede* and *Thorpe* are unavailing. (*See* PA Br. at 26 n.12.) Contrary to PharmAthene's contention, the relevant consideration under the law of the case doctrine is the determination made by the trial court—not the positions argued by the parties. *See Cede*, 884 A.2d at 39-40; *Thorpe*, 1997 WL 67833, at *4 ("[O]nly to the extent the Supreme Court has reversed the findings or conclusions of the prior proceeding need or may this court take up those matters for a new or different analysis.").

(citation omitted).

Here, too, the Court of Chancery's detailed Post-Trial Opinion was sound as to its denial of expectation damages, the relevant facts (that is, the parties' expectations in 2006) did not change, and there was no basis for reconsideration. *See, e.g.*, *Daiichi Sankyo, Inc.* v. *Apotex, Inc.*, 2009 WL 1437815, at *8 (D.N.J. May 19, 2009) (declining to revisit issue decided by trial court and not reversed on appeal where there were no "new facts, or an intervening change in law" and concluding that "[t]o hold that the Federal Circuit's reversal eviscerates the inequitable conduct portion of that decision—even though it *expressly* declined to reach it—exceeds the bounds of reason.") (emphasis in original). The law of the case doctrine thus should have prevented the Court of Chancery from abandoning its 2011 rulings that expectation damages are speculative.

Unable to rebut the law of the case doctrine, PharmAthene pivots, claiming that it would be "arbitrarily denied" its right to appeal the Court of Chancery's original ruling that expectation damages here are speculative if that ruling were law of the case. (*See* PA Br. at 2-3, 25.) That argument demonstrates a fundamental misunderstanding of both the law of the case doctrine and the appellate process. Under the law of the case doctrine, the Court of Chancery was bound by its original ruling that expectation damages are speculative. *See, e.g.*, *Waid* v. *Merrill Area Public Schools*, 130 F.3d 1268, 1272 (7th Cir. 1997) ("A lawsuit, like all good drama, requires consistency between acts. 'The law of the

case doctrine generally binds a court to its own previous decision on issues arising earlier in the litigation as well as to decisions entered by a higher court earlier in the litigation.'") (citing 18 James Wm. Moore et al., *Moore's Federal Practice* § 134.21[3][b] ("*Moore's*")). But the law of the case as established by the Court of Chancery does not bind this Court, and would not restrict this Court's review. *See, e.g.*, *Moore's* § 134.22[2][a] (3d ed. 2015) ("The law of the case as presented in the [trial] court has no binding effect on the court of appeals.").[3] PharmAthene could have challenged the Court of Chancery's 2011 denial of expectation damages on this appeal, under the clearly erroneous standard, but did not. *See Bank of N.Y. Mellon Trust Co., N.A.* v. *Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011).

Contrary to what PharmAthene argues, this Court's remand was not an instruction to the Court of Chancery that all remedies were back on the table. (*See* PA Br. at 25.) As set forth in SIGA's Opening Brief, this Court properly clarified the relevant standard for determining damages available to PharmAthene for its breach of contract claim, and then remanded to the Court of Chancery to "reconsider[]. . . the damages award consistent" with that standard. Sup. Ct. Op. at 352. The Court also instructed the Court of Chancery that expectation damages are

[3] This Court's 2013 opinion is generally the law of the case on appeal, but not with respect to issues expressly undecided. *See, e.g.*, *Hoskins* v. *State*, 102 A.3d 724, 729 (Del. 2014) ("issues resolved" in a prior appeal "tend to bind this Court should the case return on appeal after remand"); *Moore's* § 134.22[2][b] ("[T]he decision of the first appeal establishes the law of the case to be followed on [a] second appeal.").

available only where "the plaintiff can prove damages with reasonable certainty," and pointedly did not disturb the Court of Chancery's conclusion that expectation damages here are fatally "speculative and too uncertain, contingent, and conjectural." *Id.* at 351 n.99 (citation omitted). Therefore, contrary to its expressed view on remand, the Court of Chancery was not "completely unconstrained" in awarding "money damages of whatever number I set." (A676.) It was constrained by its own prior rulings and the law of the case doctrine.

C. In Addition to the Law of the Case, the Court of Chancery Properly Found in 2011 that Expectation Damages Are Speculative.

Even if the law of the case did not apply, the Court of Chancery's 2011 ruling that "PharmAthene's claim[] for expectation damages . . . is speculative and too uncertain, contingent, and conjectural" was correct. Post-Tr. Op. at *37 (citation omitted).[4]

1. Speculative Damages Are Not Available.

Remarkably, PharmAthene's brief ignores entirely this Court's express instruction that "[n]o recovery can be had for loss of profits which are determined to be uncertain, contingent, conjectural, or speculative." Sup. Ct. Op. at 351 n.99 (internal quotation marks & citation omitted). As this Court correctly stated, the law in Delaware is perfectly clear that expectation damages are not available unless they can be proven with reasonable certainty. *Id.* (citing *Callahan* v. *Rafail*,

[4] Capitalized terms not defined herein have the meaning ascribed to them in SIGA Technologies, Inc.'s Opening Brief on Appeal.

2001 WL 283012, at *1 (Del. Super. Mar. 16, 2001)); *see also* Post-Tr. Op. at *31 (citing Summ. J. Op. at *11); *Amaysing Techs. Corp.* v. *Cyberair Commc'ns, Inc.*, 2004 WL 1192602, at *4 (Del. Ch. May 28, 2004).

PharmAthene instead attempts to argue that where the *fact* of damages is established, certainty is not required. (PA Br. at 31-32.) But that is not the law, as even the very cases PharmAthene cites make clear. *Agilent Technologies, Inc.* v. *Kirkland*, a trade secret case, held that "future lost profits must be established by 'substantial evidence' and not by speculation." 2010 WL 610725, at *29 n.271 (citation omitted). PharmAthene omits this quotation from its discussion of the case. The court went on to note that the plaintiff's "future lost profits can be established by 'substantial evidence' because [its] lost profits can be proven . . . ." *Id.* *Beard Research, Inc.* v. *Kates*—also a trade secret case—agreed that the court could "not set damages based on mere 'speculation or conjecture' where a plaintiff fails to adequately prove damages." 8 A.3d at 613 (citation omitted). Again, PharmAthene fails to address this language in its brief. In both cases, unlike here, damages were capable of being calculated by extrapolating from years of plaintiffs' actual sales history prior to the misappropriation. *Agilent*, 2010 WL 61075, at *28-29; *Beard*, 8 A.3d at 615-18. As the Court of Chancery correctly found in 2011, there were yet no sales at all for ST-246 and no guarantee that there ever would be any. In fact, after SIGA spent tens of millions of dollars of its own money, sales began in 2013—nearly *7 years* after the breach—and generated

substantially less than the Court of Chancery's damages calculation.

2. The Court of Chancery Was Right in 2011.

As set forth in SIGA's Opening Brief, the Court of Chancery's conclusion in its 2011 Post-Trial Opinion that PharmAthene's expectation damages are fatally "speculative and too uncertain, contingent, and conjectural" was correct. Apparently recognizing that the Court of Chancery's Post-Trial Opinion is well-supported by the record, Pharmathene implicitly urges this Court to ignore (as PharmAthene has in its brief) the Post-Trial Opinion entirely, arguing instead that the 2014 ruling is subject to review under the clearly erroneous standard. But nothing has changed since the Post-Trial Opinion was issued in 2011 to render the parties' expectations as of December 2006 any less speculative.

The Court of Chancery properly found in 2011 that even had the parties successfully negotiated a license agreement, expectation damages were, "in a literal sense . . . merely speculative" because of numerous uncertainties, including that "ST-246 might never receive FDA approval, there are no guaranteed purchasers of ST-246, and research and delays or problems in animal trials might prevent ST-246 from reaching a viable market in a timely fashion." Post-Tr. Op. at *31. The Court of Chancery also relied on, "among other things, regulatory matters, questions of demand, price, competition, and the parties' marketing competency." *Id*. at *37. The Court of Chancery further found that it could not rely on the damages model presented by PharmAthene's expert in 2011 for an

award of damages because "[t]he huge fluctuations in [Jeffrey] Baliban's estimated damages . . . 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." *Id*. at *37 & n.224. *None* of these facts has changed. The parties' expectations as of 2006 are as conjectural and speculative now as they were at the time of breach and at the time of trial.

The Court of Chancery's 2011 conclusion is amply supported by the record. As of December 2006, SIGA had successfully completed only one single-dose human clinical safety trial. Post-Tr. Op. at *20; AR328-29; AR416-17. Significant testing remained to be done even as of the time of trial. (AR485; AR492; AR413-14; AR423-24.) It was also still unknown what tests would be acceptable for FDA approval[5] under the animal rule.[6] While SIGA hoped that ST-246 might one day be accepted into the Strategic National Stockpile, PharmAthene's own expert testified that no set of criteria existed to determine how, when, or in what quantities the U.S. government might acquire a smallpox antiviral. (AR475-76; AR499-500 ("criteria didn't exist in 2006").)

[5] FDA approval is relevant because under the Project Bioshield Act of 2004, no drug may be acquired for the Strategic National Stockpile prior to FDA approval unless there is "sufficient and satisfactory clinical experience or research data . . . [to] support a reasonable conclusion that [it] will qualify for [FDA] approval or licensing within eight years," among other mandatory criteria. Pub. L. 108-276, 118 Stat. 843-44, 835 (2004) (codified at various parts of 42 U.S.C. § 247d-6b). FDA approval is also necessary for other domestic sales. 21 U.S.C. § 301 *et seq*.

[6] AR496; AR498; *see also* A519-20; AR487-88; AR490; AR481 ("we, nor the FDA, nor anybody knows exactly what the right animal trial is to do. And the solution has been to iteratively do more and more experiments.").

For all the reasons set forth in SIGA's Opening Brief, any projections as to future profits of ST-246 were inherently speculative. PharmAthene tries to distinguish the cases cited in SIGA's Opening Brief (at 22-23) on the grounds that, unlike in those cases, ST-246 eventually found a market (nearly 7 years post-breach). (PA Br. at 34.) But ST-246's current, limited success does not establish what the parties could reasonably have expected (rather than fervently hoped for) at the time of breach, when ST-246 was in the early stages of testing and faced the same uncertainties that bar expectation damages for other drugs or new technologies.[7] And even if ST-246's successful development could have been predicted in 2006, the trial court found that there remained "questions of demand, price, competition, and the parties' marketing competency." Post-Tr. Op. at *37.

3. The Court of Chancery's 2014 Decision Is Clearly Erroneous.

Nothing the Court of Chancery invoked on remand to justify revisiting and reversing its conclusions in the Post-Trial Opinion—the BARDA contract, the fact that its original ruling was reversed, and the Supreme Court's confirmation that expectation damages are theoretically available for breach of a Type II agreement—is sufficient to support an award of expectation damages.

Nearly eight years after the breach, and after a full trial on the merits, the

[7] PharmAthene's assertion that it could have realized value by sublicensing ST-246 (PA Br. at 33) is even more speculative than its claim for lost profits. Not only would a valuation of a hypothetical sublicense for ST-246 suffer from the same uncertainties that doom a claim for expectation damages, it also is fatally speculative because PharmAthene presented no evidence that a final contract would have granted it the right to sublicense ST-246 or that established the monetary value of such a hypothetical sublicense.

Court of Chancery claimed for the first time on remand that its prior finding that PharmAthene was not entitled to expectation damages was based on its purported uncertainty as to whether expectation damages were available as a matter of law. This claim is contradicted by the record: in its prior, comprehensive analysis of this exact issue, the Court of Chancery never expressed that *any* such uncertainty factored into its conclusion that expectation damages are wholly speculative. *See PharmAthene, Inc.* v. *SIGA Techs., Inc.*, 2011 WL 6392906, at *3 (Del. Ch. Dec. 16, 2011). Rather, the Court of Chancery's post-trial conclusion that PharmAthene was not entitled to expectation damages was rooted in its extensive factual findings, which showed that expectation damages were "speculative and too uncertain, contingent, and conjectural." Post-Trial Op. at *37; *id.* at *31-33, *35-37 ("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 . . . agreed to exchange at the time that the breach occurred."); Summ. J. Op. at *11-13. There is no credible basis for this sudden about-face. As discussed *infra*, the other justifications the Court of Chancery relied upon for revisiting its previous conclusion are similarly unavailing; its ruling on remand is thus clearly erroneous.

(a) The Evidence That Doomed Expectation Damages in 2011 Has Not Changed.

Except for the post-breach award of the BARDA contract, *all* of the evidence the Court of Chancery relied on for awarding expectation damages on

remand was also before and considered by the same Court of Chancery at the time of its Post-Trial Opinion—and was *rejected*. None of that evidence changed in the intervening three years before the Remand Opinion was issued, yet the conclusions the Court of Chancery drew from that evidence on remand are diametrically opposed to the conclusions it drew in 2011.

For example, the Court of Chancery previously concluded that the "huge fluctuations" in Baliban's damages model, based on changes to variables such as the number of courses sold and the timing of those sales, "confirm that it would be unduly speculative to attempt to fix a specific sum of money as representative of PharmAthene's expectation damages." Post-Tr. Op. at *37 & n.224. These variables as measured at the time of breach were not made more certain by the post-breach evidence the Court of Chancery improperly considered on remand. Indeed, although it claimed to rely on the BARDA contract, the Court of Chancery instead relied on an imaginary, earlier award of that contract and disregarded the *actual* number of courses sold under that contract and the *actual* timing of those sales. Ex. B at 21-22, 31-34, 46-48. The Court of Chancery further concluded on remand that "[*b*]*ased on the evidence presented at trial* [in 2011]"—specifically, evidence of Baliban and Peck—the parties could reasonably have expected in 2006 that ST-246 had a high probability of success. *Id*. at 26-31 (emphasis added). This about-face was wholly without basis.

(b) The Post-Breach BARDA Contract Cannot Change the Parties' Expectations at the Time of Breach.

As set forth in SIGA's Opening Brief, the Court of Chancery on remand improperly relied on post-breach evidence in an attempt to cure the fatally speculative nature of expectation damages as of the time of the December 2006 breach. (SIGA's Opening Brief on Appeal, D.I. 10 ("SIGA Br."), at 32-35.) But events occurring as much as seven years after breach cannot be used retroactively to create a certainty that did not exist in 2006—or even at the time of trial in this matter in 2011.

SIGA is aware of just two cases in which the Court of Chancery has considered post-breach evidence. *See Comrie* v. *Enterasys Networks, Inc.*, 837 A.2d 1, 17 (Del. Ch. 2003); *Cura Fin. Servs. N.V.* v. *Elec. Payment Exch., Inc.*, 2001 WL 1334188, at *23-24 (Del. Ch. Oct. 22, 2001). PharmAthene argues that because SIGA acknowledges this, the Court of Chancery's reliance on the BARDA contract is appropriate. (PA Br. at 39.) But the fact that there is no *absolute* bar to considering post-breach evidence does not mean that such evidence can be used for any purpose, or that events occurring five—or more—years after breach can be used to rewrite the facts as of 2006. In 2006, it was unknowable when ST-246 would succeed in testing, or even *if* it would succeed. Indeed, that is still the case today. The award of the BARDA contract years later does not change this.

As set forth in SIGA's Opening Brief, both *Cura* and *Comrie* used post-breach evidence to limit, rather than increase, the damages sought by

plaintiffs. The court in *Cura* acknowledged that the remedy provided "if anything, slights" the plaintiff, but was unwilling to impose greater damages due to the dearth of reliable financial information. 2001 WL 1334188, at *24. PharmAthene asks the opposite—to collect a windfall *despite* the dearth of reliable financial information. The court in *Comrie* declined to award the full amount of damages sought because there was uncertainty at the time of breach as to whether the options plaintiffs sued to enforce would all have vested—a concern that was underscored by the fact that plaintiffs, mere months after the breach, were terminated and lost a portion of the options altogether. 837 A.2d at 17. Again, uncertainty in both cases was—properly—resolved against the plaintiffs. Neither case stands for the proposition asserted by PharmAthene that a court can rely on post-breach evidence to resolve concededly uncertain expectations at the time of breach in order to "help" a plaintiff trying to prove expectation damages.

PharmAthene's reliance on *Honeywell International Inc.* v. *Hamilton Sundstrand Corp.*, 378 F. Supp. 2d 459, 465-66 (D. Del. 2005) and the so-called "book of wisdom" is also misplaced. The "book of wisdom" concept, as set forth in SIGA's Opening Brief, is principally limited to damage calculations for infringement of property rights. *Honeywell* itself was a patent infringement case that relied on the plain language of a federal statute allowing the calculation of damages based on a "reasonable royalty" through a "hypothetical negotiation" model. *See id.* at 465-67 ("[T]he plain language of the statute clearly supports the

flexible 'book of wisdom' approach'"). PharmAthene contends that *Honeywell* "adopt[ed] the 'book of wisdom' approach from contract cases that have used it" (PA Br. at 40), but this is incorrect. All but one of the cases cited by *Honeywell* concerned claims involving patents or trade secrets. The one case that did not is a decision from the Court of Federal Claims that cites *Sinclair Refining* and the "book of wisdom," but does not discuss or explain the application of that concept outside the context of patent or trade secrets law. *Franconia Assocs.* v. *United States*, 61 Fed. Cl. 718, 757 n.67, 767 n.87 (Fed. Cl. 2004).

PharmAthene has no property interest in ST-246 that has been infringed: it had a simple contract right to good faith negotiations over a draft LATS lacking material terms. PharmAthene is limited to its damages in contract under Delaware common law and cannot recover any sort of federal statutory calculation of lost property rights. The Court of Chancery's reliance on *Honeywell* and the "book of wisdom" in fashioning its damages award here through the creation of a hypothetical license agreement and a "reasonable royalty" based on that agreement is thus flawed. In effect, the Court of Chancery awarded a patent infringement measure of damages, despite its earlier ruling that such damages are inappropriate. *See* Summ. J. Op. at *13.

(c) The Court of Chancery Erred in Cherry-Picking Evidence.

As set forth in SIGA's Opening Brief, while the Court of Chancery should not have considered post-breach evidence at all (and did so only over SIGA's

protest), its unfairly selective use of it was improper. Of the evidence presented on remand, the Court of Chancery relied only on post-breach evidence favorable to PharmAthene and ignored other post-breach evidence favorable to SIGA that would have greatly reduced, or even eliminated, the amount of damages. (*See* SIGA Br. at 35-37.) For example, the Court of Chancery found that PharmAthene had a "reasonable" expectation that SIGA would sell 14.9 million courses of ST-246, beginning in *2010*, even though the BARDA contract—which the Court of Chancery expressly considered and relied upon—was not awarded until after the January 2011 trial in this action, it provides for the sale of 1.7 million courses, and the first delivery of ST-246 did not occur until 2013. *See* Ex. B at 31-34, 46-48.

This is not a credibility issue. If post-breach evidence is to be considered at all, there is no dispute about what actually occurred post-breach—yet the Court of Chancery makes assumptions that are radically more favorable to PharmAthene than what actually occurred. PharmAthene not only fails to defend the Court of Chancery's selective use of post-breach evidence, but fails even to address it—effectively conceding that the award is clearly erroneous. *See* 5 Am. Jur. 2d Appellate Review § 512 ("If an appellee fails to respond to an issue in its brief, the court may treat the failure to respond as a confession that the appellant's position is correct"); *Trammell* v. *State*, 622 So. 2d 1257, 1261 (Miss. 1993) (same).

(d) The Court of Chancery's Findings are Contrary to Science and the Undisputed Evidence.

Similarly, as set forth in SIGA's Opening Brief, nothing in the evidence

presented at trial or on remand supports the Court of Chancery's adoption of a contraindication rate to establish the volume of sales the parties "reasonably" could have expected in 2006. PharmAthene does not even address the uncontradicted trial testimony from Dr. Eric Rose, SIGA's CEO, explaining why there is no market for ST-246 for patients who have contraindications to the standard vaccine. PharmAthene also ignores its own expert's concession at trial that he had no basis to assume sales based on the contraindication rate. (*See* A517-18.) Instead, PharmAthene tries to justify the use of a contraindication rate by attempting to introduce into the record a BARDA document dating from 2010. (PA Br. at 46 & n.31.) Even if it were properly before the Court, the 2010 document—which sets forth the basis for awarding a contract to SIGA rather than soliciting additional proposals—says nothing about the parties' expectations as of December 2006. Nor does it support PharmAthene's position, as the portion of the original BARDA request for proposals corresponding to a 4% contraindication rate—the option for 12 million additional courses—was stricken from the final contract. (B3; AR591.)

(e) PharmAthene's Factual Recitation Is Irrelevant.

Because it cannot defend the Court of Chancery's determination on remand, PharmAthene provides an extensive exposition of the facts as PharmAthene would have this Court believe they exist—not as the Court of Chancery found them. The Court should not be distracted by PharmAthene's attempts to divert the focus to what it wrongly characterizes as "SIGA's expectations" at the time of breach.

Whatever these expectations may have been, the Court of Chancery has already held that they were too speculative to support an award of expectation damages.

The evidence PharmAthene cites (PA Br. at 28-31) relates principally to back-of-the envelope calculations made internally at SIGA in preparation for negotiating an initial allocation of capital accounts for a continuing collaboration with PharmAthene, *not* a valuation (AR502-03). There is a "fundamental difference" between projections prepared to support negotiations for a continuing relationship, where payment may depend on achieving certain milestones, and a damages valuation analysis, which "has to do with risks that may or may not be borne as this plays out." (AR505-06.) Unlike a damages analysis, assessments of potential value for a licensing transaction do not entail the risk of full payment with no success. (*See*, *e.g.*, AR503.)[8]

PharmAthene's supposed evidence was in front of the Court of Chancery in 2011 (AR541-48; AR 567; AR 576; AR 584) and again on remand, but was never used by the Court of Chancery as a basis for the calculation of damages. In any event, there is no basis to conclude that SIGA's preliminary calculations, made in the context of attempting to bolster SIGA's bargaining position, could ever

[8] Other evidence PharmAthene cites simply cannot form the basis for an award of expectation damages on remand. For example, PharmAthene asserts that SIGA entered into a contract "worth $2.8 billion" in October, 2010. (PA Br. at 18.) This figure refers to the maximum amount of revenue available—not a valuation—had BARDA awarded SIGA a contract with a significant option component *and* exercised all options. Post-Tr. Op. at *11; B1771-72. But the contract *actually* awarded to SIGA contains no option component, and the revenue *actually* available under that contract is less than one-sixth of the amount PharmAthene claims. The $2.8 billion in revenue potentially available under a non-existent contract says nothing about the parties' reasonable expectations at the time of the breach in 2006.

overcome the numerous uncertainties faced by the parties in 2006. The parties' hopes, dreams, and projections are the very definition of speculation, as the Court of Chancery found unequivocally and correctly in 2011.

D. SIGA's "Bad Faith" Does Not Excuse PharmAthene's Failure to Prove Expectation Damages With Reasonable Certainty.

PharmAthene's lengthy recitation of the events leading up to the failure of negotiations in 2006 is intended to justify the Court of Chancery's invocation of SIGA's bad faith as a basis for awarding speculative expectation damages. This effort fails for several reasons. First, the only "bad faith" in this case is that SIGA negotiated for terms that differed from those set forth in a license agreement term sheet that SIGA did not believe was binding.[9] Such conduct—a failure to negotiate in good faith a commercial contract between sophisticated parties—does not relieve PharmAthene of its burden to prove damages with reasonable certainty, and certainly does not entitle PharmAthene to a jackpot-sized windfall.

Second, and as set forth in SIGA's Opening Brief, the wrongdoer rule PharmAthene invokes, properly understood, would lessen its burden of proof *only* as to any uncertainties directly caused by the breach. (SIGA Br. at 37-39.) By contrast, the uncertainties that doom expectation damages here are due to external factors that have nothing to do with SIGA's failure to negotiate in good faith.

[9] There is no basis for PharmAthene's allegation that SIGA has acted in bad faith with respect to its accounting treatment of amounts received under the BARDA contract. To the contrary, the Court of Chancery expressly took "no position as to the appropriateness of SIGA's revenue recognition policies" (Ex. B at 16 n.31) and represented that it would not credit PharmAthene's additional allegations of bad faith in awarding damages (A871; A884).

Duncan v. *TheraTx, Inc.*, which PharmAthene cites, is illustrative. In that case, the defendant's breach of a merger agreement caused a temporary restriction on the ability of certain stockholders to sell their shares. 775 A.2d 1019, 1021, 1022 & n.7 (Del. 2001). The major uncertainty in calculating damages—"what the plaintiff[s] would have done with [their] securities had they been freely alienable"—was caused by the breach. *Id*. at 1023 (internal quotation marks & citation omitted). The court calculated damages based on the difference between a "highest intermediate price" achieved while the restriction was in effect and the average price during a reasonable period immediately after the restriction was lifted, in order to approximate the effect on share value caused by the restrictions. *Id*. at 1023-25. Significantly, the court rejected a calculation of damages based on the actual price later obtained for the plaintiffs' shares (or, for those plaintiffs who retained their shares, the trading price at the time of trial), because such approach would shift to the defendant the risk of fluctuations in share price that had nothing to do with the breach. *See id*. at 1023-24, 1027. The award in *Duncan*—unlike the award here—was grounded in evidence and tailored to the scope of the injury due to the breach, and it appropriately excluded uncertainties caused by external factors (here, all the uncertainties inherent in developing an experimental drug and the discretionary actions of the U. S. Government in awarding national security contracts).

Moreover, even if appropriately applied (which it was not in this case), the

wrongdoer rule does not obviate the plaintiff's burden to prove its damages with reasonable certainty. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) (even where uncertainties are result of breach, speculative damages cannot be awarded).[10] Were PharmAthene's (and the Court of Chancery's) view of the wrongdoer rule correct, there would be no bar on speculative damages at all. When there is a breach of contract, it is often the case that the finder of fact cannot determine precisely what the world would have been "but for" that breach. Yet courts require damages be proven—by the plaintiff—with reasonable certainty.[11] It is tautological, and anathema to our judicial system, to argue that because the defendant prevented the "but for" world from occurring, any uncertainties in damages are attributed to defendant. Delaware law makes no such mistake. *See*, *Duncan*, 775 A.2d at 1022, 1023-24.

[10] The remaining cases PharmAthene cites (PA Br. at 35) support this. *See Thorpe* v. *CERBCO, Inc.*, 1993 WL 443406, at *12 (Del. Ch. Oct. 29, 1993) ("[C]ourts will not award damages which require speculation as to the value of unknown future transactions"); *Am. Gen. Corp.* v. *Cont'l Airlines Corp.*, 622 A.2d 1, 7-8, 9-10 (Del. Ch. 1992) (rejecting "speculative" theories of damages and allocating uncertainty to defendants *only* as to question of "what [plaintiffs] would have done with [their] securities had they been freely alienable" because defendants' breach had "interfered with the salability of [plaintiffs'] warrants"), *aff'd*, 620 A.2d 856 (Del. 1992); *Tanner* v. *Exxon Corp.*, 1981 WL 191389, at *2 (Del. Super. July 23, 1981) ("Speculative damages are not recoverable.") (citation omitted); *Boyce* v. *Soundview Tech. Grp., Inc.*, 464 F.3d 376, 391-92 (2d Cir. 2006) (noting that damages must be proven with "'reasonable certainty'" and reversing because of faulty jury instruction regarding the "'wrongdoer rule'") (citations omitted).

[11] *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, an antitrust case, expressly distinguished the lesser certainty required for proving damages under the Sherman Anti-Trust Act from the greater certainty required for "actions upon contract." 282 U.S. 555, 565 (1931).

CROSS-APPELLEE'S ARGUMENTS ON CROSS-APPEAL

II. PharmAthene Is Not Entitled to "Expectation Damages in the Form of a Cash Flow."

A. Question Presented: If this Court reverses the Court of Chancery's award of expectation damages, should it remand for the Court of Chancery to award expectation damages in the form of an equitable payment stream, as PharmAthene suggests?

B. Standard of Review: "Whether or not an equitable remedy exists or is applied using the correct standards is an issue of law and reviewed *de novo*." *Schock* v. *Nash*, 732 A.2d 217, 232 (Del. 1999) (citation omitted). The underlying choice of remedy, to the extent it amounts to an application of fact to the correct legal standard, is reviewed for abuse of discretion. *Lingo* v. *Lingo*, 3 A.3d 241, 243-44 (Del. 2010).

C. Merits: PharmAthene is not entitled to "expectation damages in the form of a cash flow."

This Court already held that PharmAthene is not entitled to equitable relief but instead "must look to the contract as the source of a remedy on the breach of an obligation to negotiate in good faith." Sup. Ct. Op. at 348. That is because the previous justification for entry of an equitable award—PharmAthene's claim for promissory estoppel—was reversed on appeal. PharmAthene's sole remaining claim is for breach of contract. PharmAthene is not entitled to an equitable remedy for this claim. Nor is PharmAthene entitled to an award of expectation damages

"in the form of a cash flow." While PharmAthene claims that "[t]his Court repeatedly referred to the . . . payment stream remedy as expectation damages" (PA Br. at 8 n.2), it simply *never* did so.[12]

Thus, the hybrid equitable payment stream/constructive trust previously awarded by the Court of Chancery remains unavailable. And rightly so: a constructive trust is a remedy for violation of a fiduciary relationship or infringement of a property interest.[13] The relationship between SIGA and PharmAthene has only ever been contractual—there is no confidential or fiduciary relationship that could justify imposition of a constructive trust and no dispute that SIGA, the rightful owner of ST-246, ever usurped or infringed any property interest of PharmAthene.[14]

Further, PharmAthene has an adequate remedy at law in the form of reliance damages. Rest. (Second) of Contracts § 349 (2014) ("as an alternative" to expectation damages, the "injured party has a right to damages based on his reliance interest"). Where an adequate remedy at law exists, no equitable relief is

---

[12] *See* Sup. Ct. Op. at 351 n.102 (noting that Court of Chancery's award of an equitable payment stream was based in part on promissory estoppel and "hold[ing] . . . that where a fully integrated contract encompasses the promise at issue, promissory estoppel does not apply.").

[13] Donald J. Wolfe, Jr. and Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 12.07[b] (2012) (constructive trust is a remedy 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 convey it to him"); 90 C.J.S. *Trusts* § 11 (2015) ("[T]he remedy is available where there is standard fraud or a breach of duty arising out of a confidential or fiduciary relationship.") (citation omitted).

[14] A payment stream would thus be equivalent to a patent measure of damages, which the Court of Chancery has already correctly rejected in this case as a remedy for a breach of contract. *See* Summ. J. Op. at *13.

available, absent factors not present here. *See El Paso Natural Gas Co.* v. *TransAm. Natural Gas Corp.*, 669 A.2d 36, 39-40 (Del. 1995).[15] The evidence presented by SIGA at trial suggests an award of reliance damages of approximately $205,000. (AR775.) This was uncontested by PharmAthene, which made a strategic decision not to proffer any evidence of reliance damages at trial, knowing its actual losses due to SIGA's breach were minimal. That reliance damages are smaller than the enormous windfall PharmAthene seeks is not a basis for finding them inadequate.[16] *Cf. id.* at 41 (even where a plaintiff considers the legal remedy "less desirable" than an equitable remedy, "this does not render the legal remedy . . . inadequate.").

There is no support in any case cited by PharmAthene for its claim that the "*equitable* payment stream" (PA Br. at 48 (emphasis added)) can simply be treated

[15] None of the cases selectively quoted by PharmAthene (PA Br. at 51-53) supports the availability of an equitable remedy for a legal claim where there exists an adequate remedy at law. In three of the cases, the Court of Chancery declined to exercise its equitable jurisdiction for a purely legal claim. *El Paso*, 669 A.2d at 40; *Chavin* v. *H.H. Rosin & Co.*, 246 A.2d 921, 922 (Del. 1968); *Mass. Mut. Life Ins. Co.* v. *Certain Underwriters of Lloyd's of London*, 2010 WL 3724745, at *4 (Del. Ch. Sept. 24, 2010). Two of the cases address equitable, not legal, claims. *Reserves Dev. LLC* v. *Severn Sav. Bank, FSB*, 2007 WL 4054231, at *12 (Del. Ch. Nov. 9, 2007) (considering "adequacy of the legal remedy" in the context of the fifth element of unjust enrichment), *aff'd*, 961 A.2d 521 (Del. 2008); *Wilmont Homes, Inc.* v. *Weiler*, 202 A.2d 576, 579-80 (Del. 1964) (Court of Chancery has "broad" discretion in connection with "abatement of a nuisance, a subject matter over which equity has always had jurisdiction."). Finally, *Cobalt Operating, LLC* v. *James Crystal Enterprises*, 2007 WL 2142926, at *29 (Del. Ch. July 20, 2007), *aff'd*, 945 A.2d 594 (Del. 2008) (TABLE), holds only that in the absence of a contract provision specifying a remedy, the court is free to consider other remedies.

[16] PharmAthene's reliance interest can be considered "inadequate" only in comparison its claim for expectation damages ranging from $400 million to over $1 billion. *See* Ex. B at 14 n.29 (describing PharmAthene's reliance interest as "a nominal sum relative to PharmAthene's claimed damages of hundreds of millions of dollars"). But PharmAthene's own speculative damages calculations do not set the bar for determining what is an adequate remedy at law.

as a "form" of expectation damages under breach of contract, a purely legal claim. The Court of Chancery in *Cura* expressly described its remedy as *quantum meruit*, an equitable doctrine, and noted that the contract provided for equitable remedies in the event of breach. 2011 WL 1334188, at *24.[17] *ID Biomedical Corp.* v. *TM Technologies, Inc.*, 1995 WL 130743, at *17 (Del. Ch. 1994) was a constructive trust on fraudulently obtained patent applications that rightfully belonged to the plaintiff patent-holder (not "future cash flows," as PharmAthene argues (PA Br. at 50)).[18] In *RGC International Investors* v. *Greka Energy Corp.*, 2001 WL 984689, at *16-*17 (Del. Ch. Aug. 22, 2001), the Court of Chancery awarded lump sum damages in an amount that could be determined from the preliminary agreement.[19]

Moreover, a payment stream based on a percentage of net sales would still be entirely speculative. The parties had no agreement, and thus no reasonable expectation, as to what PharmAthene's percentage of future sales would be. Post-Tr. Op. at *16-18. There also is no evidence in the record from which it could be determined what percentage of net sales to award as a payment stream.

---

[17] There is no language in the Bridge Loan or Merger Agreement to that effect—only that a party may pursue an action at law or equity. PharmAthene's contract claim is entirely legal in nature.

[18] Nor is a payment stream a practical proxy for expectation damages. Unlike expectation damages, a payment stream would require the Court to monitor the remedy's enforcement, including resolving disputes, on a continuous basis for decades. Traditionally, courts have been unwilling to grant (even equitable) relief that calls for an unduly supervisory role. *See*, *e.g.*, *Vitalink Pharmacy Servs., Inc.* v. *GranCare, Inc.*, 1997 WL 458494, at *12 (Del. Ch. Aug. 7, 1997).

[19] The "remedial discretion" in *Greka*, which involved an equitable claim, was exercised in the service of excluding certain amounts from its damages calculation—not in creating an equitable payment stream. *Greka*, 2001 WL 984689, at *17.

III. Specific Performance is Not Available.

A. Question Presented: If this Court reverses the Court of Chancery's award of expectation damages, is specific performance an available remedy, as PharmAthene suggests?

B. Standard of Review: The Court of Chancery's factual conclusion that PharmAthene failed to satisfy the prerequisites for specific enforcement of the LATS will be overturned only if clearly erroneous. *Bank of N.Y.*, 29 A.3d at 236; *Lingo*, 3 A.3d at 243-44. The Court of Chancery's denial of specific performance is reviewed for abuse of discretion. *Peden* v. *Gray*, 886 A.2d 1278 (Del. 2005) (TABLE).

C. Merits: As set forth above, this Court remanded this case solely for a determination of contract damages. As the Court of Chancery held, both in 2011 and on remand, specific performance is not available.

Even were equitable relief still on the table, specific performance is nevertheless inappropriate. The operative contract obligation that is the subject of this litigation is an obligation to negotiate in good faith, as set forth in the Bridge Loan and Merger Agreements. The Court of Chancery correctly found in 2011 that the practical difficulties of specifically enforcing an obligation to negotiate in good faith required that PharmAthene's claim for specific performance be denied. Post-Tr. Op. at *35; *see Great-W. Investors LP* v. *Thomas H. Lee Partners, L.P.*, 2011 WL 284992, at *9 (Del. Ch. Jan. 14, 2011) (noting practical difficulties of specifically enforcing obligation to negotiate in good faith); *VS&A Commc'ns*

Partners, L.P. v. *Palmer Broad. Ltd. P'ship*, 1992 WL 167333, at *4 (Del. Ch. July 14, 1992) (same).

To the extent PharmAthene seeks specific performance of the parties' term sheet, such relief must be denied because it is both legally inappropriate and almost certainly impossible. *See* 81A C.J.S. *Specific Performance* § 13. In order to be entitled to specific performance, PharmAthene must show "by clear and convincing evidence that: (1) a valid contract exists; (2) [PharmAthene] is ready, willing, and able to perform; and (3) the balance of the equities tips in [PharmAthene's] favor. . . ." Post-Tr. Op. at *31. PharmAthene cannot meet this burden. First, there is no contract to enforce. As the Court will recall, the parties memorialized the basic framework for a possible future collaboration in a preliminary license agreement term sheet—the LATS.[20] Not only did the Court of Chancery find that the LATS was not a binding contract (Post-Tr. Op. at *18), there also is no finding by either the Court of Chancery or the Supreme Court that the parties would have reached an agreement for a license based on the terms of the LATS (*see* SIGA Br. at 26). To the contrary, the Court of Chancery found that the parties would have reached agreement on terms substantially different from those set forth in the LATS (Post-Tr. Op. at *38)—an issue PharmAthene has not appealed.

[20] In the first sentence of its brief, PharmAthene incorrectly describes the *LATS* as a Type II preliminary agreement. (PA Br. at 1.) This is clearly wrong. The Type II agreement is the *obligation to negotiate in good faith*, Sup. Ct. Op. at 349, and the LATS was not a binding contract. Post-Tr. Op. at *16-18.

Second, there is no evidence in the record that PharmAthene would even be capable of performing its obligations under the LATS. There remain complex animal trials that must be successfully performed, and more human safety and laboratory tests, all of which are essential to obtaining FDA approval. There is no reason to believe that PharmAthene has the expertise to accomplish these tasks. (*See*, *e.g.*, AR483; AR484; AR494 (PharmAthene lacks expertise in pox virology and small molecule drug development); AR509 (same).) There is also no reason to believe that SIGA's BARDA contract could ever be transferred to PharmAthene. BARDA performed audits of SIGA's facilities as part of the qualifications process, and the record does not show a similar audit for PharmAthene, or that PharmAthene has SIGA's extensive history of working with government agencies on the development and commercialization of ST-246. (AR478-79; AR509-10.) PharmAthene has proffered no evidence and the Court of Chancery has made no findings that PharmAthene is able to accomplish these tasks. In fact, the evidence shows that PharmAthene is an inexperienced and ineffective drug developer, and has never successfully commercialized any product. (AR472 (confirming that PharmAthene had never "[brought] a single drug to market" as of trial in January 2011); AR473; AR510; A918-19; A916-17; AR28.)

Third, the balance of equities tilts decidedly against specific performance. In the nine years since breach, SIGA has raised capital, invested more than $70

million of its own money,[21] recruited personnel, and undertaken the laborious and complex task of developing a completely new drug for a previously untreated condition. SIGA has borne (and continues to bear) the entire risk that ST-246 will not be successful. By contrast, PharmAthene has undertaken none of the contractual obligations that the LATS would have imposed on it.[22] In these circumstances, the passage of time since breach has effectively eliminated specific performance as an available remedy. *Cf. Tull* v. *Turek*, 147 A.2d 658, 665 (Del. 1958) ("We note that further passage of time since the judgment was entered has made the granting of purely equitable relief not only inappropriate but improper."). Contrary to fundamental principles of equity, specific performance, in this case, would improperly give PharmAthene all the benefits of the LATS with none of the corresponding burdens.

[21] There is no record support for PharmAthene's assertion that "virtually all of the costs of the costs of developing ST-246 were funded by the government" (PA Br. at 21-22), and it is not true. To the contrary, SIGA has invested substantially in ST-246's development.

[22] Under the LATS, PharmAthene would have been responsible for "manufacturing of Phase I clinical trial material"; "commercial material"; "Clinical—future"; "Contract response and management"; "DOD and HHS, other Marketing"; and "Ex-US Marketing." (AR1-3.)

CONCLUSION

For the foregoing reasons, SIGA respectfully requests that the Supreme Court reverse the award of expectation damages in Part I of the Court of Chancery's Final Order and Judgment and the awards of fees and costs in Part II of the Final Order and Judgment, and further award PharmAthene damages not to exceed its reliance interest as proven by SIGA's evidence at trial.

Respectfully submitted,

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP

By: */s/ Stephen P. Lamb*
Stephen P. Lamb (#2053)
Meghan M. Dougherty (#4787)
Matthew D. Stachel (#5419)
500 Delaware Avenue, Suite 200
P.O. Box 32
Wilmington, Delaware 19899-0032
(302) 655-4410

Attorneys for Defendant Below, Appellant/Cross-Appellee SIGA Technologies, Inc.

Of Counsel:

Walter Rieman
Jaren Janghorbani
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Harold P. Weinberger
Seth F. Schinfeld
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100

Dated: May 1, 2015