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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SIGA TECHNOLOGIES, INC. A Delaware Corporation	§	
Defendant Below, Appellant/ Cross Appellee,	§	No. 20, 2015
v.	§	
PHARMATHENE, INC.,	§	
Plaintiff Below, Appellee/ Cross Appellant.	§	

PLAINTIFF BELOW, APPELLEE/CROSS-APPELLANT PHARMATHENE, INC.'S REPLY BRIEF ON CROSS-APPEAL

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PRELIMINARY STATEMENT

SIGA in its reply, states:

> "The loss of a good faith negotiation is simply not a lottery ticket for speculation damages, and this Court should make clear that Delaware is not a forum for litigants hoping to get lucky." SIGA Reply Brief ("S. R. Br.") at 5.

Nothing could be further from the truth. First, this case does not involve the loss of a good faith negotiation. As this Court found in affirming the Court of Chancery's findings of liability:

> "Evidence that 'SIGA began experiencing 'seller's remorse' during the merger negotiations for having given up control of what was looking more and more like a multi-billion dollar drug' bolsters the Vice Chancellor's finding that SIGA failed to negotiate in good faith for a definitive license agreement in accordance with the terms of the LATS. Therefore, we affirm the Vice Chancellor's conclusion that SIGA acted in bad faith . . . ." Ex. A, at 346, 347.[1]

Nor is this case about whether Delaware is "a forum for litigants hoping to get lucky." S. R. Br. at 5. The issue is whether Delaware is a forum where a defendant acting in egregious bad faith can illegally take for itself another party's right to license a drug that the defendant believes is worth $3 to $5 billion and only

[1] Unless otherwise indicated, citations to "A__" are references are to SIGA's Appendix A; citations to "RA__" are references to SIGA's Reply Appendix, and citations to "B__" are references to PharmAthene's Appendix B. References to Exhibits A through D are to the opinions and orders that were attached to PharmAthene's Answering Brief On Appeal and Cross-Appellant's Opening Brief On Cross-Appeal ("Ph. Br."). Exhibit E is the Court of Chancery's December 16, 2011 Opinion denying SIGA's Motion for Reargument, *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 WL 6392906. *Lehman Bros Holdings Inc v. Spanish Broad Sys. Inc.* and *Wittington v. Dragon Grp., L.L.C.* are unreported decisions attached hereto as Exhibits F and G respectively.

be required to pay $200,000 as compensation. As this Court also stated in its decision:

> "Under Delaware law, 'bad faith is not simply bad judgment or negligence, but rather it implies 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.'" Ex. A at 346.

That is the issue before this Court.

In addition, SIGA has once again made statements and presented supposed facts that are simply not supported by the record. Some of the more important are listed below.

> (1) "[N]othing has changed since the Post-Trial Opinion was issued in 2011 to render the parties' expectations as of December 2006 any less speculative." S. R. Br. at 13.

SIGA completely ignores the fact that new evidence was entered into the record during the remand hearing at the Court of Chancery, which the Court of Chancery relied on to confirm the expectations of the parties at the time of breach. As the Court of Chancery noted in its Remand Opinion, the BARDA contract "mitigates or possibly eliminates some of the concerns I expressed in the Post-Trial Opinion regarding ST-246's future prospects, including the possibility that the drug might not generate any profits at all." Ex. B at *6.

> (2) "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.'" S. R. Br. at 14, n.5.

SIGA again tries to argue that the ultimate question of FDA approval makes the success of ST-246 speculative. But the Court of Chancery held in its Remand Opinion that "as of the date of the breach, the U.S. government already had outlined criteria for procuring pharmaceuticals for the Strategic National Stockpile ("SNS"), the target market for ST-246. These requirements did not include FDA approval of the drug being considered for acquisition." Ex. B at *11.

> (3) "PharmAthene not only fails to defend the Court of Chancery's selective use of the post-breach evidence, but fails to even address it—effectively conceding that the award is clearly erroneous." S. R. Br. at 21.

SIGA has apparently missed the two pages of PharmAthene's opening brief titled "The Court of Chancery Properly Looked at Post-Breach Facts for a Very Limited Purpose," where PharmAthene showed that the Court of Chancery was justified in considering post-breach evidence and properly used that evidence to aid its determination of proper expectations at the time of breach. *See* Ph. B. at 39-40. PharmAthene has conceded nothing.

> (4) "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." S. R. Br. at 22.

PharmAthene's exposition of the facts of this case is precisely the facts as previously found by the Court of Chancery and affirmed by this Court.

> (5) "The evidence [of SIGA's valuation of ST-246] PharmAthene cites 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." S. R. Br. at 23.

This simply ignores the emails and detailed analysis valuing ST-246 between $3-5.6 billion. *See* Ph. Br. at 15-16, 28-30. SIGA considered its valuations to be "easily justified." (B1189) In fact, SIGA was so convinced of its valuation's reasonableness and accuracy that it relied on it in making its deliberate decision to breach its obligations to negotiate in good faith a license in accordance with the terms of the LATS in order to take for itself what it determined to be a $3 billion plus drug.

> (6) [T]here is no evidence in the record that PharmAthene would even be capable of performing its obligations under the LATS . . . . There is no reason to believe that PharmAthene has the expertise to accomplish these tasks." S. R. Br. at 33.

The Vice Chancellor repeatedly noted that as of December 2006, PharmAthene had greater experience and more trained personnel in the areas of drug development and drug regulatory matters than did SIGA. *See* Ex. B at *14 n.67; Ex. C at *2.

ARGUMENT

I. If This Court Finds That The Chancery Court's Award Of Lump Sum Expectation Damages Is Improper It Should Remand For The Court Of Chancery To Award Expectation Damages In The Form Of A Payment Stream Or To Fashion An Appropriate Equitable Remedy

The Court of Chancery correctly concluded based on this Court's prior decision that if upon reexamination it found that lump sum expectation damages were too speculative, it was "free to determine anew if PharmAthene is entitled to a payment stream based on the terms of the LATS." Ex. B at *4, *6.

Nowhere in its decision did this Court criticize the Court of Chancery's prior award of expectation damages in the form of a payment stream or say it was limiting the equitable powers or discretion of the Court of Chancery. This is further confirmed by this Court's finding that it need not reach PharmAthene's arguments on its cross-appeal because it was affirming the Court of Chancery's finding that SIGA was liable for breaching its contractual obligations to negotiate in good faith in accordance with the terms of the LATS.

However, if this Court finds that the Court of Chancery's award of lump sum expectation damages is improper it should remand for the Court of Chancery to award expectation damages in the form of a payment stream or exercise its equitable powers to fashion an appropriate remedy including specific performance.

A. Expectation Damages In The Form Of A Payment Stream

Expectation damages can be awarded in the form of a payment stream. This

is precisely what the Court of Chancery did in its post-trial opinion and decision denying SIGA's motion for reargument. *See* Ex. C, Ex. E.

> "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." Ex. C at *42 (emphasis added).
>
> "Accordingly I grant PharmAthene's request for *expectation* or reliance damages in the form of an 'equitable payment stream' . . . ." *Id.* at *42 (emphasis added).[2]

In the Court of Chancery's decision denying SIGA's motion for reargument it described its "expectancy" payment stream.

> "[T]he 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 the *lost expectancy*." Ex. E at *4 (emphasis added).

SIGA contends that "[w]hile PharmAthene claims that '[t]his Court repeatedly referred to the . . . payment stream as expectation damages' . . . it simply *never* did so." S. R. Br. at 28. While this Court never used the word "expectation" in connection to its reference to the Court of Chancery's "expectation damages" award, it referred to it as a damages award without any comment that such an award is inappropriate in a breach of contract case and

[2] While PharmAthene believes the equitable stream should be based on the economic terms of the LATS (and the Court of Chancery now appears to agree (*See* Ex. B at *6)), PharmAthene has no objection if this Court permits the Court of Chancery to use the economic terms it adopted previously to determine the payment stream.

remanded the case for the Court of Chancery's reconsideration of its "damages award."

> "[B]ecause it is unclear to what extent the Vice Chancellor based his *damages award* upon a promissory estoppel holding rather than upon a contractual theory of liability predicated on a Type II preliminary agreement, we reverse *the Vice Chancellor's damages award* and remand the case for reconsideration of the *damages* consistent with this opinion." Ex. A at 351-52 (emphasis added).
>
> * * *
>
> "On remand, the Vice Chancellor shall redetermine *his damage award* in light of his opinion and is free to reevaluate the helpfulness of expert testimony." *Id*. at 353 (emphasis added).

Had this Court believed that the Court of Chancery's payment stream damages award was inappropriate in a breach of contract case either because (1) expectation damages could not be awarded in the form of a payment stream or (2) payment stream damages were outside the powers of the Court of Chancery under the facts of this case, it would have said so. Again this Court did no such thing; it simply directed the Court of Chancery to reconsider its damage award.

PharmAthene in its initial appellate brief cited two cases for the proposition that expectation damages can be awarded in the form of a payment stream in a breach of contract case: *ID Biomed. Corp v. TM Techs., Inc.*, 1995 WL 130743, at *1 (Del. Ch. March 16, 1995) and *Cura Fin. Servs. N.V. v. Elec. Payment Exch., Inc.*, 2001 WL 1334188, at *24 (Del. Ch. Oct. 22, 2003). In *ID Biomed. Corp. v. TM Techs. Inc.*, the plaintiff had entered into a letter agreement with TM

Technologies, Inc. ("TM") for TM to use its technology and expertise to development improvements to ID Biomed's ("IDB") DNA diagnostic systems. *ID Biomed. Corp.*, 1995 WL 130743, at *1. TM developed but did not disclose the improvements to IDB and instead filed patent applications for them in its own name. *Id*. at *13. IDB then licensed the rights to SUNY. *Id*. at *7. The court found that TM breached the letter agreement, "including the implied covenant of good faith and fair dealing." *Id*. at *13. The court imposed a constructive trust on the patents to insure IDB would receive any future economic benefit from the patents. *Id.* at *7. SIGA attempts to distinguish *ID Biomed* on the grounds that it was a "constructive trust on fraudulently obtained patent applications that rightfully belonged to the plaintiff patent-holder (not 'future cash flows,' as PharmAthene argues)." S. R. Br. at 30.

The court found:

> "IDB requests the court place a constructive trust over TM's property rights in the patent applications. A constructive trust arises when 'a defendant's fraudulent, unfair or *unconscionable conduct causes him to be unjustly enriched at the expense of another* to whom he owed some duty. *ID Biomed. Corp.*, 1995 WL 130743, at *16 (emphasis added) (citation omitted).

This in fact highlights how analogous *ID Biomed* is to the present case. The Court of Chancery found, as affirmed by this Court, that (1) SIGA had a duty to negotiate in good faith a license with PharmAthene in accordance with the terms of the LATS (Ex. A at 337), (2) "that SIGA acted in bad faith when negotiating the

license in breach of its contractual obligations" (*Id.* at 347), and (3) that under Delaware law, "bad faith . . . implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . it contemplates a state of mind affirmatively operating with furtive design or ill will." *Id*.

Therefore here, just like in *ID Biomed*, there is a breach of an agreement coupled with "unconscionable conduct [causing SIGA] . . . to be unjustly enriched at the expense of [PharmAthene]" (*ID Biomed.* at *16) thus justifying the imposition of a constructive trust.[3]

The second case, *Cura Fin. Servs.*, also involved a breach of contract case in which the court awarded damages in the amount of 100 basis points of the moneys processed as of the time of trial along with a future cash flow of "100 basis points of any such future processing . . ." 2001 WL 1334188, at *24. SIGA tries to distinguish this case on the grounds that the court in its damage analysis referenced *quantum meruit* and noted "that the contract provided for equitable remedies in the event of a breach." S. R. Br. at 30. Yes, the court stated that the "evidence would support a *quantum meruit* award of 100 basis points . . ." (*Id*. at *24), but at the end of the day this future cash flow damages award was based on its finding that the defendants had breached a "Non-Circumvention Agreement" they had entered into

[3] SIGA's contention that there is a distinction because ID Biomed's constructive trust was on the defendant's [TM's] property rights in patents misses the point. This is precisely how the court, like the Court of Chancery originally did here, protected ID Biomed's interest in future earnings generated by the patents pursuant to TM's license agreement with SUNY to whom it had assigned the patents. *Id*. at *13 (assignment to SUNY), *17 (license from SUNY to TM).

with the plaintiff. *Id*. at *17-*19. The court's reference to the Non-Circumvention Agreement's statement that Cura "shall be 'entitled to all legal and equitable remedies . . . and the recovery of costs, expenses and attorney's fees . . '" (*Id*. at *24) had nothing to do with the court's determination of its damages award but was cited as support for its decision to award costs and attorney's fees. *Id*.[4] In any event, a court may fashion an appropriate remedy for breach of contract and doing so does not make that remedy equitable in nature. *Lehman Bros. Holdings Inc. v. Spanish Broad. Sys., Inc.*, 2014 WL 718430, at *8 (Del. Ch. Feb. 25, 2014) (Ex. F).

Lastly, SIGA argues that "a payment stream based on a percentage of net sales would still be entirely speculative." S. R. Br. at 30. Nothing could be further from the truth. PharmAthene put in evidence during the original trial and the remand hearing of the appropriate percentage.

Applying the terms of the LATS using the cost of good sold ("COGS"), the only verifiable expense introduced on remand (*see* Ph. Br. at 11-22), PharmAthene is entitled to (a) $59.8 million of the $157.5 million received through September 30, 2013 related to ST-246 product sales, (b) $81.048 million (or 49.36%) of the remaining payments due under the BARDA Contract, thus resulting in total

[4] In any event SIGA acknowledges there is language in the agreements at issue here that PharmAthene may pursue an action at law or equity. S. R. Br. at 30, n.17. In fact, Section 7.13 of the bridge loan agreement states: "the Holder may proceed to protect and enforce its rights, whether by suit in equity and/or by action at law, including an action for damages as a result of any such breach and/or any action for specific performance of any such covenant or agreement." (A148) The Merger Agreement says nothing about remedies. (A197)

payments to PharmAthene under the BARDA Contract of $140.848 million out of a total of approximately $409 million, and (c) approximately 50.69% of cash received on any other future sales to BARDA (beyond the current BARDA Contract) and approximately 74.78% of any international sales of ST-246. (B2247-49, B2329).[5]

In fact, as the Court of Chancery found in its post-trial opinion "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 . . . ."[6] Ex. C at *42 (emphasis added).

B. The Court of Chancery Can Award an Equitable Remedy in the Form of Cash Flow Under the Facts of this Case

If this Court holds that any lump sum damage award is too speculative then the Court of Chancery can also award an equitable remedy including a payment stream with a constructive trust. SIGA argues that a constructive trust is limited to "a remedy for violation of a fiduciary relationship or infringement of a property interest," S. R. Br. at 28, n.13 (citing Wolf & Pittenger, Corporate & Commercial Prac. in Del. Ct. of Ch. § 12.07[b] (2012)) ("[C]onstructive trust is a remedy to 'compel a person who has fraudulent or *unfairly* obtained or asserted title to

[5] PharmAthene's expert Baliban did a similar analysis in the original trial. Baliban calculated that under the LATS the total return to PharmAthene would be approximately 70%. Ex. C at *10 n.74; (B 1478-79).

[6] The terms referenced here are the terms the Court found the parties would have agreed to, not the LATS, but the statement is equally applicable to a license applying the terms of the LATS.

property . . .'.") (emphasis added). In trying to distinguish away the availability of a constructive trust, SIGA demonstrates how applicable such a remedy really is. Here, SIGA has through its "egregious" conduct unfairly obtained all the benefits of a drug it then believed to be worth $3-$5 billion. This is consistent with *ID Biomed*, which held that a constructive trust can be imposed when "unconscionable conduct causes [the defendant] to be unjustly enriched at the expense of another to whom he owed some duty." 1995 WL 130743, at *16.

1. Equity May Provide Remedies to Address Legal Rights for Which the Legal Remedy of Damages is Inadequate

Next SIGA argues that equitable remedies are not available because PharmAthene has an adequate remedy at law—reliance damages of approximately $200,000. S. R. Br. at 28-29. SIGA acknowledges that $200,000 would be inadequate when measured against PharmAthene's claimed damages of $400 million to over $1 billion. S. R. Br. at 29, n.16.[7] Of course, even more relevant is SIGA's belief that ST-246 was worth $3 to $5 billion dollars when it decided to prevent PharmAthene from obtaining a license. In fact, SIGA has already received a contract worth over $500 million. The inadequacy of $200,000 compared to these numbers was transparently obvious to the Court of Chancery. *See* Ex. C at *29, *35 ("such a remedy would not adequately redress the harm alleged here" and

[7] However, SIGA contends such a comparison is inappropriate "because PharmAthene's own speculative damages calculations do not set the bar . . . ." *Id.* First, it is not inappropriate because there was ample support for these numbers. Second the comparison to SIGA's $3 to $5 billion numbers and the $500 million contract is completely appropriate.

holding that reliance damages would have been "basically *de minimis*" under the circumstances of this case and, therefore, inadequate).

Equity may provide remedies "in redress of legal rights for which the legal remedy of the award of damages is inadequate or impracticable." *Chavin v. H.H. Rosin & Co.,* 246 A.2d 921, 922 (Del. 1968). "The question is whether the remedy available at law will afford the plaintiffs full, fair and complete relief." *Hughes Tool Co. v. Fawcett Publications, Inc.*, 315 A.2d 577, 579 (Del. 1974). A legal remedy may be "inadequate where a party's injury from breach of contract is either noncompensable or cannot be valued with reasonable certainty." *El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.*, 669 A.2d 36, 40 (Del. 1995). "A remedy at law must be as practical to the ends of justice . . . as the remedy in equity." *Id.* at 39 (citation omitted). The courts look to the "adequacy of the legal remedy as a practical matter." *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4054231, at *12 (Del. Ch. Nov. 9, 2007), *aff'd*, 961 A.2d 521 (Del. 2008). The question of whether a damage remedy is "adequate" is left to the discretion of the Court of Chancery. *See Mass. Mut. Life Ins. Co. v. Certain Underwriters at Lloyd's of London*, 2010 WL 3724745, at *4 (Del. Ch. Sept. 24, 2010).

SIGA cites a Restatement provision that reliance damages are "an alternative to expectation damages . . . ." S. R. Br. at 28, (citing Rest. (Second) of Contracts § 349 (2014)), but ignores another Restatement provision that is right on point.

§ 39 Profit From Opportunistic Breach:

(1) If a deliberate breach of contract results in profit to the defaulting promisor and the available damage remedy affords inadequate protection to the promisee's contractual entitlement, the promisee has a claim to restitution of the profit realized by the promisor as a result of the breach. Restitution by the rule of this section is an alternative to a remedy in damages.

(2) A case in which damages afford inadequate protection to the promisee's contractual entitlement is ordinarily one in which damages will not permit the promisee to acquire a full equivalent to the promised performance in a substitute transaction.

(3) Breach of contract is profitable when it results in gains to the defendant (net of potential liability in damages) greater than the defendant would have realized from the performance of the contract. Restatement (Third) of Restitution and Unjust Enrichment § 39 (2011).

The commentary to § 39 at page 2, makes the following observation:

> The cases in which such a remedy is appropriate are generally uncontroversial and in some instances even well known. The innovation of the present section consists… in stating a rule to generalize these commonly accepted outcomes.

Needless to say in this case PharmAthene meets all the required elements.

2. In the Absence of a Contract Provision Specifying a Remedy, a Court is Free to Consider Other Remedies

In its opening Brief, PharmAthene cited *Cobalt Operating, LLC v. James Crystal Enters.*, 2007 WL 2142926 (Del. Ch. July 20, 2007), where the court specifically found that "when a contract or agreement is silent as to the remedy for a breach, the Court of Chancery has the discretion to award any form of legal or

equitable relief. . . ." *Id*. at *29. SIGA's only effort to distinguish *Cobalt* is the statement that *Cobalt* holds only that in the absence of a contract provision specifying a remedy, the court is free to consider other remedies. S. R. Br. at 29, n.15. Needless to say this is not a distinction because this is exactly what PharmAthene cited it for. Ph. Br. at 53. Nor could SIGA take any other position because Delaware courts have repeatedly reaffirmed this principal. In *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 175 (Del. 2002) this Court held "courts will not construe a contract as taking away other forms of appropriate relief, including equitable relief, unless the contract explicitly provides for an exclusive remedy." In *Eureka VIII LLC v. Niagara Falls Holdings LLC*, 899 A.2d 95, 107 (Del. Ch. 2006) the Court of Chancery stated that where "a contract or agreement is silent as to the remedy for a breach, the Court of Chancery has the discretion to award any form of legal and/or equitable relief and is not limited to awarding contract damages." *See also Universal Enter. Grp., L.P. v. Duncan Petroleum Corp.*, 2013 WL 3353743, at *18 (Del. Ch. July 1, 2013).

3. The Court of Chancery has Broad Discretion to Fashion an Appropriate Remedy

Second, SIGA contends that the equitable relief granted below was "unprecedented." SIGA's Opening Brief at 3. Although the facts of this case appear unique, the equitable principles upon which the Court of Chancery based its decision are well established. It is a maxim of equity that "equity will not suffer a

wrong without a remedy." Ex. C at *34. As this Court has stated in *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. . . . It is necessary for the Court to adapt the relief granted to the requirements of the case so as to give to the parties that to which they are entitled.

See also Whittington v. Dragon Grp., L.L.C., 2011 WL 1457455, at *15 (Del. Ch. Apr. 15, 2011) ("This Court, as a court of equity, has broad discretion to form an appropriate remedy for a particular wrong.") (Ex. G); *Gilliland v. Motorola, Inc.*, 873 A.2d 305, 312 (Del. Ch. 2005) ("As Delaware has long recognized, 'the Court of Chancery [has] the inherent powers of equity to adapt its relief to the particular rights and liabilities of each party.'")[8]

In addition to imposing a constructive trust as an appropriate remedy for breach of contract, especially when there is unconscionable conduct as discussed at pages 7-9, *supra*, a constructive trust can also be imposed pursuant to the Court of Chancery's equitable powers. Identifiable proceeds of specific property can be subject to a constructive trust. *Hogg v. Walker*, 622 A.2d 648, 652 (Del. 1993). The Court of Chancery also recognized there is "[a]nother equitable remedy

[8] Further, a lack of precedent for an equitable award is no bar to granting it. *Lichens Co. v. Standard Commercial Tobacco Co.*, 40 A.2d 447, 452 (Del. Ch. 1944) ("Fundamental principles will be seldom disregarded by a court of equity, but in general its function is to give such relief as justice and good conscience may require, and. . . its powers are not necessarily limited by a lack of early precedents.")

similar in purpose and operation to a constructive trust"—an equitable lien. Ex. C, at *34. The Court found that "[i]f one were to consider applying either or both concepts" the specific property might be the intellectual property rights in ST-246 and the proceeds might be subject to an equitable lien. *Id*. *See also Hogg*, 622 A.2d at 652 ("The doctrine of constructive trust effectuates the principle of equity that one who would be unjustly enriched, if permitted to retain property, is under an equitable duty to convey it to the rightful owner. It is an equitable remedy of great flexibility and generality. . . .'")

Accordingly, if this Court finds that the Court of Chancery's award of lump sum expectation damages is improper it should remand for the Court of Chancery to award expectation damages in the form of a cash flow or exercise its equitable powers to fashion an appropriate remedy.

II. If This Court Reverses The Court of Chancery's Expectation Damages Award and Remands For The Court Of Chancery To Determine A Different Remedy, Specific Performance Is An Available Remedy

PharmAthene raised the issue of specific performance on its prior appeal. As previously noted this Court declined to reach the issues raised in the prior cross appeal "because we reverse the Vice Chancellor's damages award and remand for him to reconsider it in light of this opinion." Ex. A at 353.

However, even though this Court did not reach the issue of specific performance raised by PharmAthene in its cross appeal the Court of Chancery concluded that its prior decision rejecting specific performance was law of the case and the Court could not therefore revisit the issue. Ex. B at *4. However, for all the reasons previously set forth in PharmAthene's first brief (*see* Ph. Br. at 1-3, 24-26), the Court of Chancery's prior decision is not law of the case and it was entitled to revisit the issue.

In addition the nature of the LATS as determined by this Court required the Court of Chancery to revisit the issue. The Court of Chancery originally concluded that the parties had to negotiate a license with terms "substantially similar" to the LATS. Ex. C at *23. However, as the Court of Chancery recognized on remand this Court placed far "greater weight on the terms" of the LATS (Ex. B at *4) holding that "neither party could in good faith propose terms inconsistent with that agreement." Ex. A at 351. This fact alone should obligate

the Court of Chancery to revisit the issue of specific performance.[9]

Second the Court of Chancery concluded that the passage of time precluded specific performance. PharmAthene commenced this action promptly on November 20, 2006, the date of SIGA's breach and has pursued it diligently. It would be completely inequitable to hold that the passage of time caused by SIGA's repeated motions now acts as a bar to specific performance.

Lastly, this Court in its prior decision quoted from *Great-W. Investors LP v. Thomas H. Lee Partners, L.P.*, 2011 WL 284992 (Del. Ch. Jan. 14, 2011) that:

> "[A]n agreement to negotiate in good faith *may* be binding under Delaware law, however, and specific performance could, in theory, be an appropriate remedy for breach of such a provision." (emphasis added). Ex. A at *9.

If this Court does not affirm the Court of Chancery's lump sum damages award and remands the case, the issue of specific performance should be squarely before the Court of Chancery.

[9] Even if the prior decision was law of the case this doctrine is "not an absolute bar to reconsideration of a prior decision that is clearly wrong, produces an injustice or should be revisited because of changed circumstances." *Gannett Co. v. Kanaga*, 750 A.2d 1174, 1181 (Del. 2000).

CONCLUSION

It is respectfully requested that this Court affirm the judgment of the Court of Chancery below. Alternatively, if this Court does not affirm it is respectfully requested that this Honorable Court remand to the Court of Chancery to determine an appropriate remedy including damages in the form of a cash flow or another remedy appropriate for the facts of this case, or direct the Court of Chancery to award specific performance in the form of a license incorporating the terms of the LATS or to reconsider on remand the availability of specific performance.

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