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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 OPENING BRIEF ON APPEAL

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Nature of the Proceedings

This appeal presents the question whether, after having declined, post-trial, to award expectation damages that it determined were "speculative and too uncertain, contingent, and conjectural," the Court of Chancery erred, following remand from this Court, when it ignored its own findings and awarded expectation damages based on the same record supplemented only by cherry-picked evidence of events occurring post-trial and a series of arbitrary and inaccurate assumptions.

Two years ago, SIGA Technologies, Inc., the developer of an experimental smallpox drug, ST-246, came to this Court to request reversal of an excessive and unprecedented "equitable damages award" in connection with failed negotiations over a license with PharmAthene, Inc. On that appeal, this Court rejected PharmAthene's claim for promissory estoppel, reversed the equitable remedy, and remanded so that the Court of Chancery could consider what award, if any, PharmAthene might be entitled to based exclusively on "the contract as the source of a remedy." This Court held that expectation damages, not just reliance damages, are potentially available for breach of an obligation to negotiate in good faith, but cautioned that "[a]n expectation damages award presupposes that the plaintiff can prove damages with reasonable certainty," and that damages that are too "uncertain, contingent, conjectural, or speculative" are not permitted.[1]

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[1] *SIGA Techs., Inc.* v. *PharmAthene, Inc.*, 67 A.3d 330, 334, 348, 351 & n.99 (Del. 2013) (hereinafter "Sup. Ct. Op.") (citation & internal quotation marks omitted).

SIGA now appeals again, because, on remand, the Court of Chancery imposed a damages award even more excessive than its vacated one. In doing so, the Court of Chancery ignored this Court's instructions, ignored its own prior factual and legal findings, and manipulated both the record and the burden of proof to punish SIGA with a $194 million judgment. That judgment—nearly as large as the market capitalizations of SIGA and PharmAthene combined—forced SIGA to file for protection under chapter 11 of the Bankruptcy Code in order to pursue this appeal.

In its original 2011 post-trial opinion, dated nearly five years after the alleged breach, the Court of Chancery correctly found that "PharmAthene's claims for expectation damages in the form of a specific sum of money representing the present value of the future profits it would have received absent SIGA's breach is *speculative and too uncertain, contingent, and conjectural*. Therefore, I decline to award such relief." *PharmAthene, Inc.* v. *SIGA Techs., Inc.*, 2011 WL 4390726, at *37 (Del. Ch. Sept. 22, 2011) (hereinafter "Post-Tr. Op.") (emphasis added) (citation omitted). As the Court of Chancery then ruled, "[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." *Id*. PharmAthene appealed that determination, but this Court declined to address that claim, leaving it undisturbed as the law of the case.

On remand, the Court of Chancery waved this all aside. Remarkably, the

Court stated that its prior findings were made "in the context of where I knew I was going . . . in terms of the kind of relief that I prescribed." (A674.) The Court continued, "as far as I'm concerned, I am completely unconstrained, and I could award money damages of whatever number I set." (A676.)

Based on the very same expert testimony that was presented at trial and *rejected*, with the same "numerous uncertainties" still existing—and with this Court's clear guidance that "uncertain, contingent, conjectural, or speculative" expectation damages cannot be recovered—the Court of Chancery nevertheless awarded damages based on pure surmise. Its award of speculative expectation damages for the entirely conjectural lost future profits of an experimental drug in early stage development is unprecedented. Unless that award is overturned by this Court, and any recovery limited to PharmAthene's reliance interest, Delaware law will stand apart from the law in all other major commercial jurisdictions. For these reasons alone, it must be reversed. But the Court of Chancery made several other key errors.

The Court of Chancery arbitrarily and selectively looked to post-breach, indeed post-appeal, evidence to determine what the parties' expectations were at the time of breach seven years earlier. This was plainly improper—some of these events were quite literally unforeseeable in December 2006, such as the award in May 2011, *more than four years after breach*, of a contract with the Biomedical Advanced Research Development Authority ("BARDA")—a government agency

that did not even come into existence until the day before the breach—to deliver ST-246 to the Strategic National Stockpile ("SNS"). The Court of Chancery then compounded its error by rewriting that contract to be more favorable to SIGA than it actually is (thereby inflating PharmAthene's damages) by disregarding contractual terms and post-trial events that were inconsistent with its desired remedy. For example, the Court decided that sales of ST-246 would have begun in 2010, ignoring the undisputed fact that the first course was not delivered until 2013. In the model adopted by the Court, the calculation of damages is extremely sensitive to changes in the timing of ST-246 sales; indeed, in its post-trial opinion, the Court specifically relied on that sensitivity in rejecting PharmAthene's expectation damages as "inherently speculative." Post-Tr. Op. at *37 & n.224. Yet on remand, the Court repudiated its own prior ruling, ignored undisputed evidence, and disregarded the extreme sensitivity the Court had found so compelling before. Had undisputed facts occurring post-breach like these not been selectively ignored, the result under the Court's own prescribed calculation would have been a damages number in the *negative* tens of millions of dollars. (A697-98.)

Finally, but of no small significance, the Court of Chancery erroneously used SIGA's breach of its duty to negotiate a commercial contract in good faith as a rationale for effectively relieving PharmAthene of its duty to prove damages that are not speculative—a legally improper burden shift that had the effect of exacting

a remedy that is essentially punitive. No such remedy is available for breach of contract under the circumstances presented here.

For these reasons and those set forth below, the judgment should be reversed. Four opinions and orders of the Court of Chancery are at issue.

- On August 15, 2013, the Court of Chancery issued a bench ruling in which it reopened the record to admit selective evidence of events that had occurred since trial for the purpose of permitting PharmAthene an additional opportunity to prove its expectation damages. *See* Ex. A.
- On August 8, 2014, the Court of Chancery issued a Memorandum Opinion in which it reversed its previous determination that PharmAthene had failed to prove expectation damages. The Court of Chancery directed the parties to attempt to agree on a form of final order and judgment. *See* Ex. B.
- On January 7, 2015, the Court of Chancery issued a Letter Opinion resolving the parties' disputes regarding a form of final order and judgment. *See* Ex. C.
- On January 15, 2015, the Court of Chancery issued a Final Order and Judgment. *See* Ex. D.

Summary of Argument

1. The Court of Chancery erred by awarding PharmAthene expectation damages on remand:

   a. PharmAthene's expectation damages are speculative and contingent.

   b. The law of the case prohibits an award of expectation damages and an award based on patent law principles.

   c. The Court of Chancery improperly and selectively considered post-breach evidence.

   d. The Court of Chancery erroneously relied on SIGA's "bad faith" to cure the speculative nature of PharmAthene's expectation damages.

Statement of Facts

This litigation arises from failed negotiations for a collaboration between SIGA and PharmAthene to develop and bring to market ST-246, an experimental drug owned and developed exclusively by SIGA. *See* Sup. Ct. Op. at 334-40. ST-246 is intended for the treatment and prevention of pathogenic orthopoxvirus diseases, including smallpox. *Id*. The details of the parties' negotiations in 2006 for a License Agreement Term Sheet ("LATS"), Merger Agreement, and Bridge Loan Agreement are set forth in this Court's prior opinion. We recount here only facts necessary to this appeal.

A. The Merger Agreement Terminates and the Parties Are Unable to Agree on a Continuing Collaboration

The Bridge Loan and Merger Agreements between SIGA and PharmAthene provided that if a merger was not consummated, the parties would "negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the [LATS]." (A132; A271.) After the Merger Agreement terminated in September 2006, the parties began negotiations on a license agreement, which were cut short when PharmAthene filed suit on December 20, 2006.

B. The First Court of Chancery Proceeding

PharmAthene's initial complaint sought relief on theories of breach of contract, breach of express covenants, promissory estoppel, and unjust enrichment. At an 11-day trial in January 2011, PharmAthene's presentation of evidence

focused primarily on attempting to prove that the LATS was a binding contract that had been breached, and that PharmAthene was entitled to expectation damages for that alleged breach. Post-Tr. Op. at *30. In support of its damages calculations, PharmAthene submitted no fewer than six expert scenarios that purported to support a damages award ranging from $402 million to $1.070 billion. *Id.* at *36.

On September 22, 2011, the Court of Chancery issued its Post-Trial Opinion, which rejected PharmAthene's primary arguments for breach of contract and the remedy of expectation damages. It found that the LATS was non-binding and ruled that "PharmAthene has not shown that . . . [the parties] intended to bind themselves to enter into a license strictly conforming to the LATS." *Id.* at *2, *13-16, *19. It also found the terms of the LATS non-binding "for a second and independent reason: they do not contain all the essential terms of a license agreement for a product like ST-246." *Id.* at *16-18. The Court concluded that SIGA was liable only for breach of its obligation to negotiate in good faith under the Bridge Loan and Merger Agreements and on a theory of promissory estoppel.

Based on its review of the extensive evidentiary record—including "[h]aving carefully reviewed the testimony and reports of PharmAthene's experts . . . especially [Jeffrey L.] Baliban," PharmAthene's damages expert—the Court found that expectation damages could not be awarded because they were "speculative and too uncertain, contingent, and conjectural" (*id.* at *37):

[E]ven a consummated license agreement between PharmAthene and

> SIGA in accordance with the LATS still would subject PharmAthene to the possibility that it might not profit at all for a host of reasons . . . ST-246 might never receive FDA approval, there are no guaranteed purchasers of ST-246, and research delays or problems in animal trials might prevent ST-246 from reaching a viable market in a timely fashion . . . PharmAthene's claimed expectation damages could be considered, in a literal sense, to be merely speculative.

Id. at *31. The Court of Chancery also identified other sources of uncertainty concerning PharmAthene's damages, including, "among other things, regulatory matters, questions of demand, price, competition, and the parties' marketing competency." *Id.* at *37.

The Court of Chancery then rejected Baliban's damages models. It found that "[t]he huge fluctuations in [his] estimated damages (in the hundreds of millions of dollars) based on changes to a few variables in his analysis confirm that it would be unduly speculative to attempt to fix a specific sum of money as representative of PharmAthene's expectation damages." *Id.* at *37 & n.224. The Court also recognized that it could not award expectation damages for "*a license agreement that . . . was never consummated, because such an award would be speculative*." *Id.* at *33 (emphasis added). Indeed, the Court of Chancery made no factual finding that the parties would have reached agreement on a license in accordance with the terms of the LATS, and so it could not award expectation damages based on the LATS.

Instead, the Court of Chancery relied on its finding that SIGA was liable on promissory estoppel to create an award it termed an "equitable payment stream" or

"constructive trust," based on a judicially imagined[2] agreement—materially different from that contemplated by the LATS—that the Court of Chancery found the parties would have reached. *Id.* at *38. Under that imagined agreement, the Court awarded PharmAthene 50% of net profits, after SIGA first earned $40 million, for a period of 10 years dating from the first commercial sale of any product derived from ST-246. *Id.* at *38.

C. The First Appeal

SIGA appealed and PharmAthene cross-appealed. This Court affirmed the Court of Chancery's finding of breach of a preliminary agreement to negotiate in good faith (a "Type II" agreement). This Court agreed that the LATS and its terms were not binding, but held that the obligation to negotiate in good faith "'reflects an intent on the part of both parties to negotiate toward a license agreement with economic terms substantially similar to the terms of the LATS.'" Sup. Ct. Op. at 346 (quoting Post-Tr. Op. at *22).[3]

[2] Neither PharmAthene nor SIGA ever claimed that they would have reached agreement on the terms found by the Court of Chancery. Indeed, in the negotiations following the termination of the Merger Agreement, PharmAthene insisted that it would not agree to a higher upfront fee. (A361-62.) Notwithstanding that evidence, the Court of Chancery concluded that in a good faith negotiation, PharmAthene would have agreed to pay SIGA $40 million upfront instead of the $16 million in milestone payments required by the LATS. Post-Tr. Op. at *38, *40. Furthermore, there is no evidence PharmAthene would even have been capable of making a higher upfront payment in the fall of 2006, as it had recently failed to raise the lesser amount of $25 million necessary for the merger to close. (A515.) Yet the Court of Chancery's imagined agreement included just such a higher upfront fee.

[3] As this finding—that the terms of the LATS were not binding—was undisturbed on appeal, it is the law of the case and thus conclusive on this appeal. *See Cede & Co.* v. *Technicolor, Inc.*, 884 A.2d 26, 38-39 (Del. 2005).

This Court then reversed the Court of Chancery's conclusion that SIGA was liable on a theory of promissory estoppel, further reversed the Court of Chancery's equitable damages award, and remanded with instructions that "a Vice Chancellor 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. This Court also stated that while expectation damages are theoretically available for breach of a Type II agreement, they can be awarded only if (1) "the trial judge makes a factual finding, supported by the record, that the parties would have reached an agreement but for the defendant's bad faith negotiations" and (2) the "plaintiff can prove damages with reasonable certainty." *Id.* at 350-51 & n.99.

This Court further found that "the Vice Chancellor made two key factual findings, supported by the record: (1) 'the parties memorialized the basic terms of a transaction in . . . the LATS, and expressly agreed in the Bridge Loan and Merger Agreements that they would negotiate in good faith a final transaction in accordance with those terms' and (2) 'but for SIGA's bad faith negotiations, the parties would have consummated a license agreement.'" Sup. Ct. Op. at 351 (citation omitted). However, as described above, the agreement the Court of Chancery imagined the parties would have reached differed substantially from the terms of the LATS. Neither the Court of Chancery nor this Court ever found that the parties would have reached an agreement based on the terms of the LATS.

This Court did not reach PharmAthene's cross-appeal—including its appeal

from the Court of Chancery's holding that expectation damages were too speculative to be awarded—and remanded for a determination of damages. *Id.* at 353.

D. The Court of Chancery Proceedings on Remand

On remand, although PharmAthene represented that it was "fully comfortable with your Court [i.e., the Court of Chancery] drawing its own conclusions from the Supreme Court decision in light of your own decision," the Court of Chancery indicated that it would be receptive to a motion to reopen the record. (A668; A670-71.) The Court of Chancery also stated that it did not consider itself to be bound by its previous factual and legal findings, not because they were incorrect, but because when the Court made those findings, it had believed that an equitable remedy was available:

> But I don't, I definitely do not believe that I am bound by that, because I made them in the context of where I knew I was going and where everything ended up going, in terms of the kind of relief that I prescribed . . . as far as I'm concerned, I am completely unconstrained, and I could award money damages of whatever number I set.

(A674-76.) On August 15, 2013, the Court of Chancery reopened the record over SIGA's objection.

1. SIGA's Development of ST-246

As shown in the first Court of Chancery proceedings and on the previous appeal, ST-246 remained in the very early stages of its development throughout the

parties' 2006 negotiations and at the time of breach in December of that year.

While the drug achieved unanticipated significant milestones in the months after the parties entered into the Bridge Loan and Merger Agreements in the spring of 2006, its development remained uncertain and there was no clear path to regulatory approval. Because the lethality of smallpox makes human efficacy tests impossible, the only way ST-246 can achieve approval is through the "Animal Efficacy Rule," or "Animal Rule," a new alternative to the typical FDA approval process authorized following the attacks on September 11, 2001, amid growing concern regarding bioterrorism. (A462.) Even at the time of trial, however, the Animal Rule was not an established path to approval, as no novel drug had ever achieved approval by this method, and the FDA had not even determined what testing models would be adequate to achieve approval. (A365; A519-20; A527-30; A448; A462-67.) In fact, the FDA did not even convene an advisory committee to consider regulatory paths for the potential approval of smallpox treatments until December 2011, almost a year after trial.

At the time of the breach in December 2006, ST-246's safety and efficacy had not been demonstrated. The results of efficacy tests were mixed, and those results were insufficient to predict whether there even existed a safe dose of ST-246 for humans that corresponded to the dose levels that showed some effectiveness in animal studies. (A447.) This remained true even as of the report of SIGA's regulatory expert, Dr. David A. Kessler, dated December 17, 2009,

three years after the breach. (A447-49.) At most, ST-246's progress in 2006 was sufficient to support further research and development. It was by no means evident that ST-246 would ever be successful. To this day, the FDA has not yet approved ST-246, and its commercial viability is accordingly limited.

2. The 2013 Evidentiary Hearing

On December 18 and 19, 2013, the Court of Chancery held an evidentiary hearing at which PharmAthene presented new evidence—that SIGA had been awarded a contract from BARDA—in an attempt to bolster its expectation damages claim, but no additional evidence or testimony from Baliban or any new attempt to quantify damages beyond what was presented in the first trial. SIGA demonstrated in rebuttal that post-trial developments have only further discredited the speculative damages models presented by PharmAthene's expert in 2011. For example, Baliban's entirely hypothetical assumptions concerning the volume of sales to the SNS are orders of magnitude greater than sales actually made under the only existing BARDA procurement contract, and there have been no other sales to the Department of Defense ("DOD") or the rest of the world. (A807-09.) Baliban's made-up assumptions regarding timing of sales are also speculative: while Baliban assumed that sales would begin as early as 2008, the first delivery of ST-246 did not occur until 2013. (*Id.*) Because of the decreasing time value of money, even a one-year delay in sales has an outsized effect on a calculation of expectation damages. (A533); Post-Tr. Op. at *37 n.224.

To demonstrate how widely Baliban's calculations diverge from reality, Dr. Keith Ugone, SIGA's damages expert at trial, created an illustrative valuation of the BARDA contract by applying the terms of the LATS and, as reasonable inputs, expense information calculated in accordance with the May 31, 2012 Final Order's definition of "Total Product Expenses." Those calculations show that the total net present value of the actual BARDA contract (not as rewritten by Baliban and the Court of Chancery) was approximately $21 million as of December 20, 2006—even assuming, contrary to the record, that the contract or its value could have been anticipated as of the December 20, 2006 breach. (A697-98.) Of that amount, PharmAthene's share under the LATS would be a *negative* $11.2 million.[4]

3. The Remand Opinion

On August 8, 2014, the Court of Chancery issued its opinion on remand (the "Remand Opinion") in which it reversed its own earlier ruling that expectation damages are "speculative and too uncertain, contingent, and conjectural." Post-Tr. Op. at *37. Although the Court of Chancery recognized that expectation damages must be based on the parties' reasonable expectations as of the December 2006 breach, it ignored this Court's holding that "[n]o recovery can be had for loss of profits which are determined to be uncertain, contingent, conjectural, or speculative," and erroneously relied on post-breach and even post-trial evidence in

[4] The net loss for PharmAthene results in part from the fact that under the terms of the LATS, PharmAthene would have been required to pay SIGA $16 million in upfront and milestone payments.

an attempt to rectify the utterly speculative nature of PharmAthene's damages calculations.

In particular, the Court of Chancery considered and relied on certain post-trial events that were not reasonably foreseeable: *First*, SIGA sold units of ST-246 under the BARDA contract, which was awarded "several years" *after* the breach. (Ex. B at 16, 30.) Despite its previous finding that Baliban's analysis was speculative due to its sensitivity to the timing of sales (Post-Tr. Op. at *37 n.224 ("were sales to commence one year later than assumed . . . the ultimate damages amount would decrease by over . . . 20%"), the Court of Chancery reversed itself on remand by finding that the same, impermissibly vague and speculative estimate that sales would begin "several years" after breach is now sufficiently definite to support a damages award.

Second, SIGA "has started to receive significant sums of money related to ST-246's commercialization" via the BARDA contract. (Ex. B at 16-17 n.31.) But the Court of Chancery ignored the actual amount of money, the contingent nature of the payments, and the fact that BARDA may terminate the contract for convenience. (A699; A609-10; A912.[5]) Additionally, while the price per course of ST-246 under the BARDA contract exceeds $100 (Ex. B at 35), the provisional dosage of ST-246 could change—as it has—significantly increasing SIGA's

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[5] The Court may take judicial notice of publicly filed documents. *In re Wheelabrator Techs., Inc. S'holders Litig.*, 1992 WL 212595, at *12 (Del. Ch. Sept. 1, 1992); D.R.E. 201.

manufacturing costs and triggering a demand by BARDA to provide additional courses with no additional payment. (A548; A550; A912.) The Court of Chancery then compounded this error by ignoring evidence favorable to SIGA that would have greatly reduced the amount of damages, such as the actual timing of sales of ST-246 and the actual profits they have yielded. (Ex. B. at 21-22, 31-34.) For example, most of ST-246's ultimate potential profitability remains unrealized because BARDA is withholding more than $100 million in payments contingent on FDA approval. (A541, A700.)

In addition, the Court of Chancery radically changed—and even reversed—several other prior findings. At the time of its opinion on SIGA's motion for summary judgment in 2010, the Court of Chancery recognized that expectation damages were likely speculative because the legislation creating BARDA was less than a day old at the time of breach and "predictive models for regulatory success are difficult to come by for ST-246 both because there are no other treatments for smallpox to compare it to and very few drugs have been approved under the Animal Efficacy Rule." *PharmAthene, Inc.* v. *SIGA Techs., Inc.*, 2010 WL 4813553, at *11 n.64 (Del. Ch. Nov. 23, 2010) (the "Summ. J. Op."). Similarly, based on the trial record, the Court of Chancery denied expectation damages as impermissibly speculative in part because "ST-246 might never receive FDA approval, there are no guaranteed purchasers of ST-246, . . . research delays or problems in animal trials might prevent ST-246 from reaching a viable market in a

timely fashion" and "as of April 2010, no final contract with BARDA yet existed." Post-Tr. Op. at *31, *37 n.224. Yet the Court of Chancery reversed course on remand by assuming, without citing any evidence, that as of "the time of the breach, PharmAthene had a reasonable expectation that the U.S. government"—indeed, an agency that did not even come into existence until the day before the breach—"would begin purchasing ST-246 for the SNS . . . by 2010, at the latest." (Ex. B at 33-34.)

In addition to being contrary to the law of the case, this is simply wrong—at the time of the December 2006 breach, absent a crystal ball, the parties had no reason to imagine that BARDA would request bids for a smallpox antiviral in March 2009, that BARDA would announce the award of a procurement contract to SIGA in October 2010, that a protest would be filed challenging the award (the protest was pending at the time the post-trial opinion was issued), that the contract would be modified, that a new request would be issued in February 2011 and the protest withdrawn, that courses of ST-246 would be delivered to the SNS (at the time the post-trial opinion was issued, no sales of ST-246 had occurred) or that regulatory hurdles could be overcome.[6]

Then, to calculate damages, the Court of Chancery adopted one of the six

[6] In addition to being a reversal of its previous findings, the Court of Chancery's conclusion on remand that BARDA has consistently reduced the eligibility criteria for SNS drugs is simply incorrect. The Court of Chancery cites no evidence for this point (*see* Ex. B at 30 n.59), and SIGA is aware of none.

damages models that it previously rejected as speculative and, without discussion or explanation, resolved all uncertainties against SIGA. One of these uncertainties is the amount of sales the parties could reasonably have expected in 2006. Because there exists no rational way to predict as of 2006 the volume of sales of an experimental drug in its early stages of development, PharmAthene seized upon a 5% contraindication rate—the percentage of the population that is estimated to be unable to use the traditional smallpox vaccine—in its sales projections. (A392-93.) The Court of Chancery, without inquiry or discussion, applied the 5% purported contraindication rate to the approximate U.S. population. This calculation yielded "an estimated sales quantity of ST-246 of 14.778 million courses" to the SNS and 125,245 courses to the DOD. (Ex. B at 39, 46.)

But this is fanciful, as the uncontroverted evidence showed. (A521-22; *see also* A525.) There already exists a vaccine that is effective in patients who are contraindicated for the standard vaccine, and the government has purchased 20 million courses of it, with options for the purchase of 25 million more. (A521.) In order to have the same effect as that vaccine, ST-246 would have to be taken chronically. This makes ST-246 both subject to higher regulatory hurdles and less likely to be used. (A521-22.) At the time of trial, the total cost per patient of the alternative smallpox vaccine was approximately $25; the cost per patient of ST-246 would be exponentially greater. (A521-22.) In short, "there is no market for an antiviral [such as ST-246] for patients who have contraindications to the

standard vaccine." (A522.) Baliban admitted at trial that he had no basis for his assumption that the government would purchase ST-246 based on the contraindication rate. (A517-18.) Yet on remand, confronted with the fact that only 1.7 million courses of ST-246 have been sold in the nearly nine years since breach (A541), the Court swallowed hook, line, and sinker Baliban's speculation that the parties could have expected sales of nearly 15 million courses of treatment.

The Court of Chancery further made arbitrary changes to the speculative damages model to "cure" its defects. The Court (1) decreased the time frame captured by the model; (2) altered the timing of the first sale of ST-246; (3) altered the quantity of initial ST-246 sales; (4) altered the distribution of sales over a five year period; (5) altered the timing of upfront and milestone payments; and (6) recalculated the projected cost of goods sold. (Ex. B, Order at 2-5.) These adjustments are completely arbitrary: they have no basis in the evidentiary record of the parties' expectations as of December 2006, or in the reality of the sales of ST-246 under the BARDA contract. Moreover, even though these changes resulted in a damages award of less than the $402 million to $1.070 billion that PharmAthene sought at trial, their arbitrariness only underscores the transparently punitive, results-oriented exercise engaged in by the Court of Chancery on remand. Exchanging one set of arbitrary assumptions for another set of cherry-picked, speculative and equally arbitrary assumptions is not permissible simply because doing so results in a discount.

Argument

I. The Court of Chancery Erred In Awarding Expectation Damages

A. Question Presented: Did the Court of Chancery err in reversing its previous determination that expectation damages are "speculative and too uncertain, contingent, and conjectural," and awarding PharmAthene damages for lost profits on remand? This issue was preserved for appeal. (A801-09; A833-43.)

B. Standard of Review: Determinations of fact are reviewed for abuse of discretion. *Reserves Dev. LLC* v. *Crystal Props., LLC*, 986 A.2d 362, 367 (Del. 2009). Legal conclusions are reviewed *de novo*. *Id.*; *Bank of N.Y. Mellon Trust Co., N.A.* v. *Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011).

C. Merits: The Court of Chancery erroneously awarded expectation damages. First, the Court of Chancery's previous determination that expectation damages here are fatally "speculative and too uncertain, contingent, and conjectural" is correct. Expectation damages cannot be awarded for the type of breach here because they cannot be determined with sufficient certainty. Second, the law of the case prohibits an award of expectation damages because the Court of Chancery was bound by its prior determination that expectation damages are speculative and because the form of expectation damages is effectively a "reasonable royalty," a patent measure of damages the Court of Chancery had already determined is unavailable. Third, the additional evidence improperly considered on remand does not resolve the uncertainties that barred expectation

damages in 2011. In fact, the findings are at odds with what has actually happened. Fourth, the Court of Chancery erred by relying on SIGA's "bad faith" to cure uncertainties as to the calculation of damages.

1. As the Court of Chancery Determined in its Post-Trial Opinion, Expectation Damages Are Speculative and Too Uncertain, Contingent, and Conjectural

The Court of Chancery previously determined that PharmAthene failed to prove expectation damages that are not fatally "speculative and too uncertain, contingent, and conjectural." Post-Tr. Op. at *37. Although PharmAthene challenged that determination on appeal, this Court did not reverse it (Sup. Ct. Op. at 353)—and it is grounded in both law and the factual findings made by the Court of Chancery in 2011.

As this Court previously instructed, Delaware law permits recovery for lost profits "only if [such] loss is capable of being proved, with a reasonable degree of certainty. No 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 (quoting *Callahan* v. *Rafail*, 2001 WL 283012, at *1 (Del. Super. Ct. Mar. 16, 2001)). Where expectation damages are speculative, the plaintiff is entitled to recover only the value of its reliance interest. *See Wood* v. *Watson's Auction Serv.*, 2010 WL 5210362, at *5 (Del. Ct. C.P. Dec. 1, 2010).

Delaware courts recognize the difficulty of calculating expectation damages that purport to measure lost profits of an undeveloped product or new business.

Summ. J. Op. at *11 (citing *Amaysing Techs. Corp.* v. *Cyberair Commc'ns, Inc.*, 2004 WL 1192602, at *4-5 (Del. Ch. May 28, 2004)). That difficulty is compounded where, as here, the new product is an experimental pharmaceutical product subject to regulatory approval, particularly if it is in an early stage of development. *AlphaMed Pharm. Corp.* v. *Arriva Pharm., Inc.*, 432 F. Supp. 2d 1319, 1322 n.3, 1345-46 & n.43 (S.D. Fla. 2006) ("[O]nly a minuscule percentage of drugs in development ever reaches the commercial market—and of those, only a subset ever prove profitable . . . . This inherent uncertainty makes the recovery of lost profits for anticipated sales of a new drug exceedingly difficult."), *aff'd*, 294 F. App'x 501 (11th Cir. 2008); *Microbix Biosystems, Inc.* v. *Biowhittaker, Inc.*, 172 F. Supp. 2d 680, 698 (D. Md. 2000) (lost profits speculative because "for the damages to be of the amount claimed (or any amount for that matter), one must assume that Plaintiff would have successfully secured a manufacturing facility, obtained FDA approval, developed the [drug] in commercial quantities, and marketed the product during the relevant time frame.").[7]

In previously finding that lost profits were unavailable, the Court of Chancery found that even *had* the parties reached a license agreement, PharmAthene's expectation damages would still have been speculative because—

[7] *See also Aronowitz* v. *Health-Chem Corp.*, 513 F.3d 1229, 1239 (11th Cir. 2008); *PharmaNetics, Inc.* v. *Aventis Pharm., Inc.*, 2005 WL 6000369, at *12, *16 (E.D.N.C. May 4, 2005) (lost profits "unreliable and speculative" where based on "novel" technology with "uncertain FDA approval" targeting "unestablished" markets), *aff'd*, 182 F. App'x 267 (4th Cir. 2006); *Cook Inc.* v. *Bos. Scientific Corp.*, 333 F.3d 737, 743-44 (7th Cir. 2003).

even at the time of trial, nearly five years after breach—"ST-246 might never receive FDA approval, there are no guaranteed purchasers of ST-246, and research delays or problems in animal trials might prevent ST-246 from reaching a viable market in a timely fashion." Post-Tr. Op. at *31. The Court of Chancery concluded that "[b]ecause under even a fully-consummated license agreement there would be a plausible chance that PharmAthene would make no profit, PharmAthene's claimed expectation damages could be considered, in a literal sense, to be merely speculative." *Id*. ST-246's development and profitability were also contingent on additional factors that were not reasonably anticipated at the time of the breach, including substantial private investments—besides government funding, SIGA has invested more than $70 million of its own money in developing ST-246 since 2006; demand from a market of one potential purchaser, the United States government; the successful award of a government contract; and FDA guidance and approvals. *See id.* at *37; *see also* A856.

Even in jurisdictions that enforce Type II agreements, no court has awarded expectation damages for failure to negotiate in good faith over the terms of a contract like this, which is "silent on significant issues," for which the missing terms cannot be judicially determined by "objective criteria" "found in the agreement itself, commercial practice or other usage and custom," and for which damages cannot be determined with any degree of certainty. *Fairbrook Leasing, Inc.* v. *Mesaba Aviation, Inc.*, 519 F.3d 421, 429-30 (8th Cir. 2008) (citation &

internal quotation marks omitted). As set forth above, the LATS is silent on significant issues, and its missing terms cannot be determined by reference to any objective criteria.[8]

Moreover, this case is wholly distinguishable from the few cases in which courts have awarded expectation damages for breach of Type II preliminary agreements. For example, the court in *Network Enterprises, Inc.* v. *APBA Offshore Productions, Inc.*, awarded expectation damages where the only terms of the preliminary agreement left to be resolved were the dates and times at which television programs would air and where the amount of damages—the lost revenue per episode—was clearly established under the terms of the Type II agreement itself. 427 F. Supp. 2d 463, 487 (S.D.N.Y. 2006). Similarly, expectation damages have been awarded for borrowers' breaches of commitment letters where the lenders' lost interest income could be determined solely by reference to the commitment letters and clear commercial practice. *See Teachers Ins. & Annuity Ass'n of Am.* v. *Ormesa Geothermal*, 791 F. Supp. 401, 415-17 (S.D.N.Y. 1991); *Teachers Ins. & Annuity Ass'n of Am.* v. *Tribune Co.*, 670 F. Supp. 491, 491, 498-508 (S.D.N.Y. 1987).

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[8] For example, the LATS is silent as to a defined research and development budget, which is the most important economic term in a contract to develop a pre-commercial drug candidate. *See* Post-Trial Op. at *17. This term was particularly significant to SIGA because at the time, PharmAthene was focused on its own anthrax drug, and without any contractual obligation to prioritize ST-246, SIGA would have no assurance that efforts would ever be taken to commercialize it. (A123; A524.)

In contrast to those fact patterns and as a threshold matter, there is no finding in this case that the parties would have agreed on a license agreement incorporating the terms set forth in the LATS. Rather, the Court of Chancery found that the parties would have reached agreement on a license materially different from that contemplated by the LATS. Post-Tr. Op. at *38. Regardless, the Court of Chancery adopted a model "in which Baliban calculated PharmAthene's damages according to the terms of the LATS." (Ex. B at 9.) It was clear error to award damages based on the LATS in the absence of any factual finding that the parties would have reached agreement on the LATS. *See* Sup. Ct. Op. at 350-51.

Further, unlike those rare cases in which expectation damages could be determined either entirely by the terms of the Type II agreements or commercial practice, expectation damages are wholly inappropriate here: even if the parties had successfully negotiated a license, it would not be possible to determine lost profits by reference to the terms of the license or to commercial practice. *See* Post-Tr. Op. at *31. Rather, lost profits here depend on a plethora of factors—product development, funding, demand from third parties, sales, etc.—entirely independent of the LATS or commercial practice and unknowable at the time of breach. Under such circumstances, courts appropriately award reliance damages, as this Court recognized in its May 2013 opinion. Sup. Ct. Op. at 349-51 & n.99.[9]

[9] The Court of Chancery purported to reserve the issue of whether PharmAthene might be entitled to an "equitable payment stream" in the event this Court reverses the award of expectation damages. (*See* Ex. B at 14-15, 18 & n.33, 53.) But there is no serious argument that

2. The Law of the Case Prohibits an Award of Expectation Damages

Having previously determined that expectation damages were speculative, the Court of Chancery was bound by that finding. The law of the case provides that "findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the trial court or in a later appeal." *Cede*, 884 A.2d at 38 (citation & internal quotation marks omitted); *see also Thorpe* v. *CERBCO, Inc.*, 1997 WL 67833, at *4 (Del. Ch. Feb. 6, 1997) ("Unless the appellate court has either expressly or impliedly overturned the trial court's findings . . . prior findings of the trial court continue as authoritative in the case."), *aff'd*, 703 A.2d 645 (Del. 1997) (table). Likewise, where a trial court's findings of fact are challenged on appeal and not reversed, they become the law of the case. *Zirn* v. *VLI Corp.*, 1994 WL 548938, at *2 (Del. Ch. Sept. 23, 1994) (rejecting idea that trial court determinations not reached by Delaware Supreme Court on appeal should be reconsidered on remand); *see also Daiichi Sankyo, Inc.* v. *Apotex, Inc.*, 2009 WL 1437815, at *8 (D.N.J. May 19, 2009) ("To hold that the Federal Circuit's reversal eviscerates the inequitable conduct portion of that

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reliance damages are not an adequate remedy for breach of contract for a plaintiff who fails to prove expectation damages. *See* Sup. Ct. Op. at 348 ("a Vice Chancellor must look to the contract as the source of a remedy"); *Prestancia Mgmt. Grp., Inc.* v. *Va. Heritage Found., II LLC*, 2005 WL 1364616, at *6 (Del. Ch. May 27, 2005); 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"); *see also El Paso Nat. Gas Co.* v. *TransAm. Nat. Gas Corp.*, 669 A.2d 36, 41 (Del. 1995) (even where a plaintiff considers the legal remedy "less desirable" than an equitable remedy, "this does not render the legal remedy . . . inadequate.").

[district court] decision—even though it *expressly* declined to reach it—exceeds the bounds of reason." (emphasis in original)). Here, the Court's clear holding that expectation damages were too speculative should have been the end of the inquiry.

The opinions in *Cede* v. *Technicolor* are illustrative. In an early opinion in that case, the Court of Chancery (Chancellor Allen) applied a 15.28% discount rate and a $19.9 million value to corporate debt for the purpose of valuing the entity at issue. *Cede & Co.* v. *Technicolor, Inc.*, 1990 WL 161084, at *25, *29-30 (Del. Ch. Oct. 19, 1990). On remand after an appeal, Chancellor Chandler purported to overrule Chancellor Allen's previous findings by applying a different discount rate and debt valuation. *Cinerama, Inc.* v. *Technicolor, Inc.*, 1999 WL 135242, at *3 (Del. Ch. Feb. 25, 1999), *rev'd on other grounds*, 758 A.2d 485 (Del. 2000). On a second appeal, this Court disagreed, finding that the initial findings made by Chancellor Allen were the law of the case, and thus binding. *Cede & Co.*, 884 A.2d at 40-41.

Here, this Court did not reverse, directly or impliedly, the Court of Chancery's determination that expectation damages are "speculative and too uncertain, contingent, and conjectural." The Court of Chancery nevertheless purported to revisit its holding on expectation damages on the basis that "the Supreme Court . . . implicitly invited me to 'reconsider' [that] decision." (Ex. B at 8 n.17.) But the Supreme Court's direction to the Court of Chancery was to disaggregate what portion, if any, of its prior award was based on breach of

contract from the portion that was awarded on a promissory estoppel theory. Sup. Ct. Op. at 351 (remanding for reconsideration of damages award "because 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 . . . ."). This Court *did not* instruct or invite the Court of Chancery to revisit its finding that expectation damages were unduly speculative—to the contrary, it specifically instructed that expectation damages cannot be awarded unless the plaintiff can prove them with reasonable certainty. Sup. Ct. Op. at 351 n.99.[10] And the Court of Chancery flatly misunderstood the significance of this Court's invitation to "reevaluate the helpfulness of expert testimony." *Id.* at 353. That invitation was extended in the context of this Court's discussion of expert fee-shifting, and was limited to a reexamination of whether expert testimony was helpful in determining a damage award "in light of this opinion"—an opinion that explicitly held that speculative damages cannot be awarded, and left untouched the Court of Chancery's original finding that expectation damages in this case are speculative. *Id*. at 351 n.99, 353.

[10] The Court of Chancery misinterpreted comments made at oral argument to find (incorrectly) that SIGA had abandoned its law of the case argument that expectation damages are not available. SIGA plainly preserved the argument (A802-05; A833-36; A872; A874-77)—a passing remark by counsel cannot be deemed waiver under the circumstances. *United States* v. *Bradstreet*, 207 F.3d 76, 80 (1st Cir. 2000) (no waiver where "a broader look at what [party] actually argued in its brief and at oral argument rebuts any appearance of waiver"); *MacDonald* v. *Gen. Motors Corp.*, 110 F.3d 337, 340 (6th Cir. 1997) (no waiver where counsel's comments implying waiver were "fundamentally at odds with any intent to waive the argument" as set forth in briefing).

3. The Court of Chancery Improperly Awarded a Patent Measure of Damages Styled as Expectation Damages

The Court of Chancery also erred by effectively awarding PharmAthene a patent measure of damages. Indeed, the Court of Chancery explicitly invoked patent law by relying on the "book of wisdom"—primarily a patent law concept—to justify its consideration of post-breach evidence in crafting its damages award. (Ex. B at 21-22 & n.43.) In patent cases, a court may award what is termed a "reasonable royalty,"[11] a remedy that permits the patent holder to recover damages where actual damages—i.e., lost profits— "cannot be adequately proved." *Wang Labs., Inc.* v. *Toshiba Corp.*, 993 F.2d 858, 870 (Fed. Cir. 1993); *see also* Mark A. Lemley, *Distinguishing Lost Profits from Reasonable Royalties*, 51 WM. & MARY L. REV. 655, 656, 661, 666-68 (2009). In determining a "reasonable royalty," the court theorizes what an infringer and patentee would have agreed to had they negotiated for a license willingly based on factors such as future sales projections. *Wang Labs*, 993 F.2d at 870; *see Lucent Techs.*, 580 F.3d at 1327. That is exactly what the Court of Chancery did here; it awarded damages based on entirely fanciful projections (now characterized as the parties' "reasonable expectations") rather than on proof.

This was error for two reasons. First, a "reasonable royalty" is not available

[11] A "reasonable royalty" may take the form of a lump sum payment, as the Court of Chancery awarded on remand, or a "running royalty" calculated as a percentage applied to actual profits. *Lucent Techs., Inc.* v. *Gateway, Inc.*, 580 F.3d 1301, 1327 (Fed. Cir. 2009).

to PharmAthene because the Court of Chancery's ruling on summary judgment that patent damages cannot be awarded is the law of the case. Summ. J. Op. at *13 ("this is not a patent infringement case"). Second, the Court improperly invoked patent law principles to award PharmAthene lost profits that it failed to prove in its simple breach of contract claim.

A recognized problem with "reasonable royalties" is that they result in overcompensation when courts wish to award lost profits but cannot do so because of failures of proof. Lemley, *supra* p. 30, at 667-68 ("By importing compensation concepts from lost profits into the reasonable royalty context without importing the strict elements of proof, these courts have turned the reasonable royalty . . . into a windfall that overcompensates patentees.").[12] By awarding damages based on speculative projections and purported "reasonable expectations" rather than facts that existed at the time of breach, the Court of Chancery gave PharmAthene a $194 million windfall. In short, under the guise of patent law principles, the Court of Chancery jettisoned the settled requirement—explicitly endorsed by this Court in its earlier opinion in this case—that a plaintiff must prove its expectation damages with "reasonable certainty."

[12] *See also* John Skenyon, et al., *Patent Damages Law and Practice* § 1:14 (noting the role that "projected profits" and "hypothetical license negotiation[s]" play in the two methodologies for calculating "reasonable royalty"); *see also* Robert A. Matthews, Jr., 7 *Annotated Patent Digest* § 41:20 (2015) ("Projections and sales forecasts are generally relevant and proper in determining a reasonable royalty.").

4. The Court of Chancery Improperly and Selectively Considered Post-Breach Evidence in Awarding Expectation Damages

(a) The Court of Chancery Inappropriately Relied on Post-Breach Evidence to Support its Award of Expectation Damages

It is well settled that "the standard remedy for breach of contract is based upon the reasonable expectations of the parties *ex ante*." *Duncan* v. *Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001); *see Comrie* v. *Enterasys Networks, Inc.*, 837 A.2d 1, 17 (Del. Ch. 2003) ("Damages are to be measured as of the time of the breach."). Damages should be based on the parties' contemporaneous and reasonable expectations, not hindsight bias or "macroeconomic and contextual variables affecting the damages calculation." *Universal Enter. Grp., L.P.* v. *Duncan Petrol. Corp*., 2013 WL 3353743, at *16 (Del. Ch. July 1, 2013).

An award of expectation damages thus must be based upon the parties' reasonable expectations for ST-246's prospects as of December 20, 2006. Even considering the evidence available as of trial in 2011, the Court of Chancery determined that, as of December 2006, "numerous uncertainties" existed concerning the marketability of ST-246, which might not have "generate[d] any profits at all." Post-Tr. Op. at *37. Although the evidence as of 2011 could not support an award of expectation damages, on remand, the same Vice Chancellor nevertheless relied on post-breach and, in fact, post-trial and post-appeal evidence in an attempt to resolve uncertainties that he had previously ruled were fatally

speculative. (*See* Ex. B at 15-16 & n.31, 21-22.)

The Court of Chancery erred in reversing its post-trial findings by relying on post-breach, post-2011 evidence. Post-breach evidence can be used only "to aid [the Court] in its determination of the proper expectations as of the date of the breach." (*Id.* at 21-22 (quoting *Comrie*, 837 A.2d at 17).) It cannot be used, as the Court of Chancery did here, to cure the fatally speculative nature of damages at the time of breach. Put another way, the chance in 2006 of an event occurring years later is not made different by the after-the-fact knowledge that the event did (or did not) occur. The results of a lottery do not affect the probability, pre-drawing, that a particular ticket will win.[13]

The Post-Trial Opinion correctly concluded that expectation damages were speculative based on the facts at the time of breach, such as that ST-246 (i) had no clear path to FDA approval, (ii) had no guaranteed purchasers, and (iii) might never "reach[] a viable market in a timely fashion." Post-Tr. Op. at *31. The parties' expectations in December 2006 are no less uncertain or conjectural merely because, post-2011, BARDA found ST-246's progress in achieving regulatory approval to be acceptable and contracted to purchase a specific number of courses of ST-246. The "numerous" uncertainties at the time of breach concerning questions of price, demand, competition, and more—dosage, potential toxicities,

[13] Here, the lottery results the Court of Chancery relied on in crafting its damages award did not even actually occur.

manufacturability, costs of manufacturing (*id*. at *37)—are not made less speculative by the additional post-breach facts the Court improperly considered on remand.[14] Moreover, those "numerous uncertainties" still exist.

Nor do any of the authorities invoked by the Court of Chancery (*see* Ex. B at 22 n.43) justify its radical departure from evidence known or knowable at the time of the breach. The two Delaware authorities the Court cites stand only for the proposition that post-breach evidence may be used to *limit* damages, not to establish them. *See Comrie*, 837 A.2d at 17 (considering plaintiffs' post-breach termination of employment to determine options that would have vested to avoid overcompensating plaintiffs); *Cura Fin. Servs. N.V.* v. *Elec. Payment Exch., Inc.*, 2001 WL 1334188, at *23-24 (Del. Ch. Oct. 22, 2001) (considering post-breach evidence as a "cautious" measure to limit plaintiff's purported expectation interest and relying on plaintiff's equitable claim for greater latitude in calculating damages). The other case, *Honeywell International, Inc.* v. *Hamilton Sundstrand Corp.*, 378 F. Supp. 2d 459, 465-66 (D. Del. 2005), is simply inapposite, as it held that the "plain language" of a federal statute provided few "discernable limitations" on a district court's discretion to fashion remedies for patent infringement, and thus

[14] BARDA had been established only one day before the breach. The Court of Chancery nevertheless relied on the BARDA contract to establish that PharmAthene reasonably expected such an agreement in December 2006. (Ex. B at 29-30 & n.59.) The Court abused its discretion in considering the existence, let alone the unforeseen and unforeseeable chain of events following BARDA's creation that led—nearly seven years *after* the breach—to delivery of a limited number of courses of ST-246 into the SNS. (*See infra* at pp. 36-37.)

"clearly" permitted the consideration of post-infringement evidence.

(b) Alternatively, the Court of Chancery Abused Its Discretion by Selectively Considering Post-Breach Evidence and Arbitrarily Resolving the Uncertainties that Barred PharmAthene's Expectation Damages in 2011

In the alternative, the Court of Chancery abused its discretion by considering post-breach evidence selectively and arbitrarily. By so doing, the Court of Chancery ignored the fact that the post-breach evidence presented on remand would actually have confirmed that an award of expectation damages was speculative or compelled a substantially smaller award. In fact, because the Court declined to consider the actual timing or amount of sales in selecting values for its damages calculations, the values selected are as arbitrary—and indeed based on the same evidence—as they were in 2011.

The Court of Chancery previously denied expectation damages because (among other factors) the "huge fluctuations in Baliban's estimated damages (in the hundreds of millions of dollars) based on changes to a few variables in his analysis confirm that it would be unduly speculative to attempt to fix a specific sum of money as representative of PharmAthene's expectation damages." Post-Tr. Op. at *37 (footnote omitted). The additional evidence considered by the Court of Chancery on remand does not bring any measure of certainty to those variables. On remand, the Court of Chancery affirmatively ignored evidence that would have resolved those variables in SIGA's favor. Instead, to supply those variables the

Court of Chancery relied on the very same expert scenarios it previously rejected as unreliable and "unduly speculative," or by assigning arbitrary values cut from whole cloth. As to amount of sales, the Court of Chancery adopted without discussion or analysis PharmAthene's assumption that the SNS would acquire 14.778 million courses and the DOD would acquire 125,245 courses based on population and PharmAthene's arbitrarily estimated "contraindication rate" which, as set forth above, finds no support in the record and is scientifically incorrect.[15] (Ex. B at 38, 42, 44 & n.81, 46.) The only sale in the more than eight years since breach is that of 1.7 million courses to the SNS under the BARDA contract. As for timing of sales, although the Court of Chancery rejected PharmAthene's speculation that sales of ST-246 would begin in 2008, it instead determined randomly that "PharmAthene had a reasonable expectation that the U.S. government would begin purchasing ST-246 for the SNS . . . by 2010." (Ex. B at 33-34.) This determination is equally arbitrary and not grounded in the record or reality: the first delivery of ST-246 did not occur until the first quarter of 2013. In any event, at the time of the December 2006 breach, the parties did not anticipate—and could not have anticipated—that *any* sales to the U.S. government

[15] The Court of Chancery's adoption of PharmAthene's assumption as to the amount of sales is also inconsistent with its own prior findings: in its post-trial opinion, the Court rejected such an assumption, stating, "BARDA offered to commit to purchase 1.7 million treatments from SIGA over three years with options to purchase another 17 million treatments over the following seven years. Baliban assumed BARDA would exercise all of these options, which clearly could overstate estimated revenues." Post-Tr. Op. at *37 n.224 (citation omitted).

would occur, let alone when they would occur.

Thus, the Court of Chancery drew arbitrary and unsupported distinctions as to the use of evidence presented on remand. The Court of Chancery opined that "it is appropriate to consider the fact that, to date, SIGA has sold 'X dollars' worth of ST–246 to evaluate whether at the time of the breach PharmAthene had a reasonable expectation of commercializing ST–246 . . . ." (*Id.* at 22.) The Court simultaneously held that it could not rely on evidence of the actual sales to calculate the *amount* of damages because they were "neither known nor knowable at the time of SIGA's breach." (*Id.*) The Court of Chancery cannot have it both ways. In choosing to consider sales "to date" of ST-246, the Court of Chancery cannot blind itself to the actual quantity and timing of those sales, which are irreconcilable with its conclusions concerning the parties' reasonable expectations.

5. The Court of Chancery Erred by Relying on SIGA's "Bad Faith" to Cure the Fatally Speculative Nature of PharmAthene's Expectation Damages

Finally, the Court of Chancery relied extensively on the so-called "wrongdoer rule" to resolve all uncertainties in calculating damages against SIGA. (*See* Ex. B. at 20 ("Doubts [about the extent of damages] are generally resolved against the party in breach . . . *A court may take into account all the circumstances of the breach, including willfulness, in deciding whether to require a lesser degree of certainty, giving greater discretion to the trier of the facts*.") (emphasis in original).) This was erroneous. The "wrongdoer rule" shifts the burden of

uncertainty to a defendant only with respect to uncertainties *caused* by its breach. *See Duncan*, 775 A.2d at 1023.[16] The uncertainties that bar expectation damages here were caused not by SIGA or its breach, but rather by external factors and third-party decision-making. These included (and to a degree continue to include), among others: (i) whether, when, or how FDA approval would be achieved; (ii) potential toxicities; (iii) feasibility and cost of manufacturing; (iv) whether or when any sales would occur, and the amount thereof; and (v) the state of the economy, which has limited government spending on biological threat countermeasures.[17]

By fashioning a damages award based on SIGA's state of mind, the Court of Chancery effectively awarded improper punitive damages. Regardless of bad faith conduct, punitive damages may not be awarded for breach of contract unless the conduct also amounts independently to a tort. *See Bhole, Inc.* v. *Shore Invs., Inc.*, 67 A.3d 444, 454 (Del. 2013); *E. I. du Pont de Nemours & Co.* v. *Pressman*, 679 A.2d 436, 445 (Del. 1996). There was no such claim or finding here.

The only basis for the Court of Chancery's finding of bad faith was that "[t]he positions SIGA took when it proposed the Draft LLC Agreement in late 2006 were so far removed from the terms of the LATS that they amounted to bad

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[16] Even where (unlike here) the uncertainty is caused by the defendant's conduct, contingent or speculative damages remain inappropriate. *See, e.g.*, *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946).

[17] PharmAthene's own anthrax vaccine candidate, on the basis of which it was to receive two-thirds of the equity in the aborted merger with SIGA, has been repeatedly delayed for development because of such issues, with no BARDA procurement occurring in more than eight years since the unconsummated merger. (A914-19.)

faith." Post-Tr. Op. at *35. But in late 2006, the law was unclear as to what extent SIGA could negotiate for better terms than those embodied in the LATS to reflect circumstances materially changed from those prevailing when the parties contracted to negotiate. Even the Court of Chancery recognized that there was leeway. Post-Tr. Op. at *16 ("the parties did not intend the LATS as attached to [the Bridge Loan and Merger Agreements] . . . to require that any later formal agreement include exactly the same terms as the LATS"). The "bad faith" at issue here thus is not a malicious disregard of a known legal obligation, but rather a vigorous commercial negotiation over a term sheet, marked on its face as "non-binding" and correctly found by the Court of Chancery to be non-binding and lacking material terms, in an industry characterized by rapid valuation changes.

Without question, SIGA's conduct did not amount independently to a tort. *See* Post-Trial Opinion at *35. The Court of Chancery recognized that there were "not really" "huge equities on PharmAthene's side." (A536.) In any event, the Court of Chancery lacks jurisdiction to award punitive damages. *See Beals* v. *Wash. Int'l, Inc.*, 386 A.2d 1156, 1158-59 (Del. Ch. 1978).

In relying on SIGA's "bad faith" (the Remand Opinion invokes it no fewer than thirty times) to award PharmAthene expectation damages that it bore the burden to prove but failed to prove, the Court of Chancery erred.

Conclusion

For the foregoing reasons, SIGA respectfully requests that the Supreme Court reverse the award of contract 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,

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